Ontario. Legislative Assembly. Standing Committee on Regulations and other Statutory Instruments.

Debates

1 - 9

1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

ORGANIZATION

THURSDAY, APRIL 8, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

CHAIRMAN: Eves, E. L. (Parry Sound PC)
VICE-CHAIRMAN: Barlow, W. W. (Cambridge PC)
Bryden, M. H. (Beaches-Woodbine NDP)
Di Santo, O. (Downsview NDP)
Gordon, J. K. (Sudbury PC)
Hennessy, M. (Fort William PC)
Hodgson, W. (York North PC)
Jones, T. (Mississauga North PC)
Kerrio, V. G. (Niagara Falls L)
McEwen, J. E. (Frontenac-Addington L)
Runciman, R. W. (Leeds PC)
Van Horne, R. G. (London North L)

Substitution:
Miller, G. I. (Haldimand-Norfolk L) for Mr. Van Horne

Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Thursday, April 8, 1982

The committee met at 10:09 a.m. in committee room 1.

ELECTION OF CHAIRMAN AND VICE-CHAIRMAN

Clerk of the Committee: Honourable members, the first item of business is to elect a chairman. Are there any nominations?

Mr. Hodgson: Yes. I nominate Mr. Eves as chairman.

Clerk of the Committee: Are there any other nominations? There being no other nominations, I declare Mr. Eves elected chairman.

Mr. Chairman: I suppose the next order of business should be to elect the vice-chairman of the committee.

Mr. Hodgson: I nominate Mr. Barlow.

Mr. Chairman: Mr. Barlow has been nominated by Mr. Hodgson. Are there any other nominations?

Mr. Hennessy: I move that nominations be closed.

Mr. Chairman: Mr. Hennessy has moved that nominations be closed. I declare Mr. Barlow elected vice-chairman.

Mr. Kerrio: Are you going to make an acceptance speech?

Mr. Chairman: Mr. Barlow probably wishes that all elections were that easy.

Mr. Kerrio: Speech.

Mr. Hennessy: Vince, are you going to the Falklands too or not?

Mr. Kerrio: Leave it up to the Irish guys. They know how to kill each other.

ORGANIZATION

Mr. Chairman: Basically, we are here today for an organizational meeting. Some members of the committee were on regulations in the last session: Mr. Runciman, Mr. Barlow and Mr. Hennessy. I am, of course, completely open to the committee's suggestion as to how you would like to proceed in the upcoming weeks.

We have found in the last session that this committee almost demands or commands a counsel to guide it to peruse and vet the various regulations that are passed each session and bring his or her recommendation back to the committee with respect to regulations

he or she sees in his or her opinion inappropriate or ultra vires or whatever.

Mr. MacTavish has been counsel for this committee for a number of years and previously was counsel with the Attorney General's ministry and has had plenty of experience in legislative drafting and regulations as a whole. If anybody has any other suggestions, the chair is certainly open to them.

Mr. Barlow: Is Mr. MacTavish is willing to take on the job again this time, if so asked?

Mr. Chairman: I believe he is, is he not, Mr. Clerk?

Clerk of the Committee: Yes.

Mr. Chairman: That is correct.

Mr. Kerrio: Just in passing, I think that it is probably very much to our advantage to have someone who has had the experience and who is not starting, as it were, from scratch. I would be in favour of having someone who has had the experience. How long has he been with the committee? Has it been a while?

Mr. Chairman: Quite a few years. He was with the committee all the time Mr. Williams was the chairman of the committee.

Mr. Kerrio: Oh, yes.

Mr. Chairman: That was a good four or five years.

Mr. Kerrio: I think it is a good way to go.

Mr. Barlow: Am I not right when I say he has been chairman as long as the committee has been in existence? Is that right?

Mr. Chairman: I think he was one of the original proponents of the committee.

Mr. Kerrio: I would like to make that motion.

Mr. Hodgson: I will second it.

Mr. Chairman: Mr. Kerrio has made the motion that Mr. MacTavish be--sorry? Ms. Bryden.

Ms. Bryden: Mr. Chairman, I am new to this committee. I have never sat on it before. I would just like to inquire, does the counsel receive extra remuneration for this position or is it part of it?

Mr. Chairman: He is not an employee of the provincial government per se. He is employed at a rate. That was the next thing I was going to bring up. The last session the hourly rate generally for counsel employed was $85 an hour.

Ms. Bryden: I am sorry, I did not hear what firm Mr. MacTavish is with.

Mr. Chairman: He is not with any firm any longer. He is just an independent solicitor who has a wide-ranging background in legislative drafting and regulations.

Mr. Kerrio has made the motion that we appoint Mr. Lachlan MacTavish, QC, to be retained as counsel for this committee for the upcoming session at an hourly rate of $85. Is the committee in favour of the motion?

Motion agreed to.

Mr. Chairman: Is Mr. MacTavish around, Mr. Clerk?

Mr. Barlow: He is probably outside the door.

Mr. Chairman: Just to bring you up to date on what this committee did during the last session, there were several old problems with respect to regulations that the committee cleaned up actually during the last session. We never got to the biggest problem, which was a favourite of Donald MacDonald, and that is the subject of notice and comment with respect to regulations.

In some jurisdictions, namely, the United States and Australia, notice and comment is a way of life. That really means that there is publication of a draft regulation. The public has an opportunity to come in and voice its objection to any proposed regulation before the regulation is implemented by the government. This experience has been tried in many other jurisdictions, including the United Kingdom, without much success.

The problem with the notice and comment system, although at first glance it would appear to be a much more open way of doing business, is that because there are so many objectors and so many public forums, regulations become almost meaningless, as many jurisdictions have found, in that there is a list of exceptions attached to each regulation which virtually exempt any meaningful impact of the regulation at all.

It is a subject that the Canadian government has been looking at for the last several years. It is one that this government has brought up and put on the back burner many times over a number of years, and it is one that the last committee felt once and for all should be--maybe not for all--dealt with finally, looked at, examined and maybe something should be done with it.

Excuse me, members of the committee, this is Mr. MacTavish for those of you who are not familiar with him. I have just been informed by the committee that you have been retained, provided you are willing of course, as counsel for the committee for the upcoming session.

Mr. MacTavish: Thank you very much.

Mr. Chairman: We have just got to the point where I was bringing up what the committee did during the last session and what the last committee was going to propose to do during this session. Of course it is entirely up to the members of this committee what avenue they wish to pursue in the upcoming session.

Ms. Bryden: On the subject of notice and comment, I am very glad that the committee has it even on the back burner because it is a subject in which I am very much interested. Particularly when I was Environment critic, it was brought up frequently that a very important way of getting consent to environmental regulations was to have opportunities to review them before they became official. There are a lot of other arguments in favour of it as well.

I notice you say that it has been tried in other jurisdictions without much success.

Mr. Chairman: That is my opinion.

Ms. Bryden: Yes. I think we should perhaps examine some of the recent literature in the area. In some other jurisdictions I am sure there are articles written in law or environmental journals and places like that that might indicate what the actual measure of success is.

You mentioned other jurisdictions, but the federal government in Canada has been doing this in the environmental field for at least a year or two and it is now routine to have notice and comment on their regulations. I think we should look at their experience, however short it may be in that field, and perhaps ask them for a report on their experience. There may be some other ministries in--

Mr. Hodgson: They have it in use in Australia too. I think we should go down and look at it and see how it is working.

Mr. Chairman: A very good suggestion, Mr. Hodgson.

Ms. Bryden: I am sorry, I had not finished.

Mr. Hodgson: Mr. Chairman, I opened up this morning to debate what program we are here to organize. I thought the meeting here was to organize.

Mr. Chairman: We have organized as far as electing the chairman and vice-chairman and appointing the counsel for the upcoming session go. We have accomplished those things. I just wanted to get a little bit of feeling, without going on too long, as to what the membership would like to put on the agenda for the upcoming session. That is all.

Ms. Bryden: I had not finished. I assumed yours was a point of order.

Mr. Chairman: Sorry, Ms. Bryden.

Mr. Hennessy: That is what we are here for.

Mr. Hodgson: I am not as used to calling points of order as the people across the House are.

Mr. Chairman: Please continue.

Ms. Bryden: As I say, I think it is an area in which we should ask for some research to be done for us and go into the

subject in some detail. I would like to put a motion that we do consider this subject as one of our main subjects of discussion. Then we can go into more detail as to how we should deal with it and what sort of research we should do in the field.

Mr. Chairman: Thank you. I do not necessarily know if we need a motion. If the general feeling of the committee membership is that we want to deal with this subject and we are all in agreement, I think we will certainly put it on the agenda.

I would like to have Mr. MacTavish make a few cursory comments with respect to the subject of notice and comment. It is my understanding, however, that we did contact the federal government during the last session and they have not implemented notice and comment. In fact, they have made almost a conscious decision to put it on the back burner again. They may have some acts whose regulations are subject to notice and comment, as indeed this government has, with a few acts.

10:20 a.m.

Mr. Kerrio: May I comment on that before Mr. MacTavish comments?

I suppose we have talked about the advantages of having notice and involvement, but then that could be counterproductive in some instances were you are going to put a bill through that is urgent and important to get out there and functioning, and particularly if it would appear that if that bill were given adequate committee hearing there would be indications of what you would expect in the regulations.

I am not all that convinced that you could just go holus-bolus and take any bill and give notice and then have it drag out at that other stage, if you have already had it to committee and had viable input at that stage. I would like to hear both sides of the argument. I am not totally convinced that it is in the best interest to have that much additional time to a bill.

Mr. Chairman: I think your comments are well taken. I am sure as we explore the subject and have witnesses before us to testify as to their experience with notice and comment, we will reach a decision of our own as to whether it is overall good or bad.

I might point out that last session we made an effort to have attendance fairly punctual and to have a quorum here for each session, and we were very successful. Again, I am open to committee members' suggestions, but we tried to limit our meetings to about an hour, or for sure no more than two hours every Thursday morning. We found that by doing that--and the subject matter can be rather dry; there is no doubt about it--we did retain the interest and the attendance of the vast majority of committee members.

Mr. Kerrio: The only thing that could make it interesting would be a change of venue.

Mr. Chairman: We also explored that possibility during the

last session, Mr. Kerrio, and we may well want to explore it again during this session.

The point was made, I might say, by Mr. MacDonald and by Mr. Nixon of your party, and the sentiment may well be shared by members of the Conservative caucus as well, that during the last couple of reports that this committee has submitted to the Legislature, the number of regulations which we have found to be wanting in one respect or another has been vastly reduced. Once we deal with the major subject of notice and comment and decide what we want to do with that, we may well want to look at whether there is a need for this committee to exist as a standing committee of the Legislature, especially with a membership of 12 meeting once a week. We may even want to consider the fact that it could be a subcommittee of another committee if we decide that there is still a need for it, for a legislative watchdog. I just throw that out at the outset; so maybe we would want to look at that down the road a little bit.

Mr. MacTavish, could you please give us your observations on notice and comment?

Mr. MacTavish: First of all, I should like to thank you and the committee for the vote of confidence. I appreciate it and I hope I can meet your needs.

As to notice and comment, certainly every effort should be brought to bear to meet your points. The picture should be put in balance because there are two sides to it. If the committee should decide to proceed with that subject, the chairman, the clerk and I will make every effort to bring people to you to put it in balance so that you may make at the end of the line an appropriate judgement.

In answer to your speech, Ms. Bryden, may I say that on instructions I shall be very happy to produce for your use whatever research you feel you can absorb. As the chairman has pointed out, this subject has been on the back burner for some years, and over those years I have produced some materials and brought them to the attention of the then committee.

I have a feeling in retrospect that I choked the committee, I just overdid it and the result was the members were faced with volumes of material. There was too much and they would not do any reading or very little. I would suggest that the material somehow be in a reduced form to avoid the possibility of having the members just throw up their hands and say, "Oh gosh, this is too much."

There are, as you suggest, a number of texts--if I may call them that--reports, dealing with the subject that are pretty well up to date, starting with Chief Justice McRuer's report. I guess that is 20 years ago now, but it is still very much current. Those could be extracted and put before you in a shape that you could read it as rapidly as possible in reasonable short order, and that might be a good starting point.

It may be that in addition to that that counsel could summarize or prepare a thumbnail sketch of the picture in other jurisdictions such as the US, Ottawa, Westminster, Australia, etc. It is sometimes difficult to get the current picture in these other

jurisdictions because the written material in the law journals and so on are not quite up to date. We do not know what is going on currently. However, I think a pretty reliable picture could be painted with a paragraph or two on each of the important jurisdictions that are in the field.

There are people in these various other important jurisdictions who are available and perhaps arrangements could be made to bring them to you, or it may be that the committee would prefer to attend them in their local bailiwicks and thereby derive greater benefit from seeing and talking to these people on their home ball field.

There are a number of officials here in Ontario I feel you should hear. I am assuming for the moment that you are going to undertake this subject. It will not be an easy one. I think, as this general subject goes, it will be as interesting as it can be. Have I answered your question?

Mr. Chairman: Yes, I think you have. Thank you, Mr. MacTavish.

The clerk has handed out the last report of 1981. Next week I would suggest that we put on the agenda a proposed report of this committee, the first report for 1982. Your predecessor committee had Mr. MacTavish keep us quite up to date and we actually had a meeting in February discussing all the regulations that had been implemented up to the end of December 1981. Is that correct, Mr. MacTavish?

Mr. MacTavish: Yes.

Mr. Chairman: That report should be submitted to the Legislature as soon as possible. It was approved by the predecessor to this committee. I would think that perhaps next week we should go over that as our first item of business.

Mr. MacTavish has quite rightly indicated that the factors that he has just mentioned were pointed out to the committee last session, and we may well want to have several witnesses attend before us. Indeed, we may want to attend some other jurisdictions to see how the system functions and works and see whether or not it has been successful. Perhaps we should leave that until next week.

Mr. MacTavish has indicated to me for the newer members of the committee that perhaps we would want to tour the regulations office here in this building perhaps for half an hour or an hour one day and see how it functions in reality and in practice. If there are no further suggestions, then I would entertain a motion to adjourn.

10:30 a.m.

Mr. MacTavish: Assuming that my job will be to examine in detail the regulations for 1982, I would appreciate instructions to do so.

Mr. Chairman: I think that committee members would be in agreement that Mr. MacTavish should proceed.

Mr. Barlow: Do you want a formal motion?

Mr. Hodgson: Are you talking about all the regulations and amendments to regulations passed in 1981?

Mr. Chairman: What Mr. MacTavish is requesting, as I understand, is the committee's authority to commence reviewing and vetting the regulations starting January 1, 1982, so that he can keep us up to date as is possible.

Mr. Hodgson: I hope the rest of the members realize there are about 20 amendments to the regulations every week. Mr. MacTavish is going to review them and then we are going to review them again. My God, we will be here every day.

Mr. Chairman: No. What has occurred in practice in reality is that there have been in the last few years anywhere from 800 to 1,200 regulations a year or amendments to the same which are implemented by the government. Mr. MacTavish has the unenviable task of reviewing each and every one of those. He only reports to this committee--this has been the standard practice--the ones he considers to be ultra vires or improper for one reason or another. Then we decide whether we--

Mr. Hodgson: Then why do we have three or four lawyers in the regulations committee doing these regulations?

Mr. Chairman: That is what their task is.

Mr. Hodgson: So they hire another lawyer to check up on the lawyer?

Mr. Chairman: That is about the size of it, Mr. Hodgson.

Ms. Bryden: Do I take it that all regulations up to January 1, 1982, have been reviewed by the previous committee?

Mr. Chairman: That is correct, and that draft report will be available for members of the committee next week and we can go over it. In fact, the clerk will get it to you before the meeting obviously.

Mr. MacTavish: If I may interject here, Mr. Chairman, last year the work of vetting the regulations, if I can use that expression, was divided into three sections: the first four months of the year; the second four months; and the final four months. That was just as a matter of convenience for the committee and, in a sense, myself. It is quite an undertaking. In many respects it is a boring job. One is swamped with detail constantly, going over each regulation in turn with a magnifying glass. That is what it amounts to.

It is nice to get rid of a piece of it, say, the first four months of the year and table a report in the House as the committee's opinion of what is going on, whether or not the government is staying within the guidelines or is trying to make regulations that are not quite within its statutory authority and

whether or not the regulations are becoming sloppy in their draftsmanship. Many of the guidelines are looked at and checked.

A report, as the chairman indicated, some years ago when this process started indicated there were as many as 25, 30, 35 or 40 regulations brought to the attention of the committee particularly and reported upon to the House for one reason or another. I think the watchdog aspect of this committee has served a very useful purpose in that the people who are concerned with the making of regulations in the various ministries and agencies and in the office of the registrar of regulations are watching what this committee reports to the House very closely and they are learning from the process. They are improving their techniques and skills as they go along.

The result of that is that in the report that you will be studying during the next week, which is the first report of this committee for this year, I think there are only seven that are questionable--I have not looked at this since February--and some of them are pretty thin points. If I remember correctly, four of them are brought to the attention of the House because their effect is retroactive without any statutory authority for making them retroactive and that is a no-no.

I think the law is reasonably clear that a regulation cannot be made retroactive in its effect without clear statutory authority for so doing. But occasionally a ministry, for some reason or another--maybe the administrative processes get caught in a long holiday and the regulation in point cannot be filed when they want it, say, January 1 or July 1--and therefore they rush it through as soon as it can be put through but it is a few days late. Therefore it has to he made retroactive to be effective on, say, January 1 or the first day of the fiscal year, April 1, or whatever.

That kind of situation is not too critical so long as it does not affect people's rights. If it cuts down or affects in any way anyone's rights, then that, I suggest, is a very serious matter for the attention of the committee and they should draw that to the attention of the House just as soon as they can. But I think the seven in question in the current report, confer benefits of one sort or another--they raise this, they raise that--therefore there is no harm done. They are helping everybody and therefore there is not a chance in the world of anybody attacking that technically ultra vires regulation. So everybody is happy and the world goes ahead.

Mr. Hodgson: But it is not legal

Mr. MacTavish: Technically it is not legal.

Mr. Hodgson: But you would have a lot of people out there mad if you had something ready for April 1 and you did not get it before the regulations committee until April 15. So you make it retroactive to April 1.

Mr. MacTavish: The system works pretty well. But the work of this committee in keeping the government on its toes, if I may use that expression, and the officials in the various ministries and agencies and so on, I think is very helpful and beneficial to them.

Although they are criticized and caught off base, if you will, on occasion, in the long run it helps the system.

Perhaps we should say that the Ontario system, having been in operation since 1944 or 1945, is just about the best there is around. It is a good system. The registrar of regulations and his staff, my experience has shown, are doing a swell job, they know their work; and if they pass a retroactive regulation the chances are they are on record with the ministry concerned and with the Attorney General that that is going on. So they are not entirely caught with their eyes closed. They know what is going on and they go on record as viewing the thing with a critical eye.

Mr. Chairman: Mr. Barlow moves that this committee adjourn until next Thursday at 10 a.m. and I see that all are in favour.

The committee adjourned at 10:41 a.m.

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

CONSIDERATION OF FIRST DRAFT REPORT 1982

THURSDAY, APRIL 15, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

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Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Thursday, April 15, 1982

The committee met at 10:16 a.m. in committee room 1.

CONSIDERATION OF FIRST DRAFT REPORT 1982

Mr. Chairman: We have a quorum. We may as well get started this morning before it is too late. I believe we agreed last week that we would go over the first draft report, which was approved by the predecessor committee in the last session. But I think that since we in this particular committee in this particular session are going to be introducing this report ourselves we should at least have the opportunity to review it.

Basically I will let Mr. MacTavish explain the intricacies, and I do not believe there are too many, with respect to this particular report. If I remember correctly there are basically seven regulations that were brought into question, and four or five of those were merely for retroactivity, which we discussed last week.

In other words, these are regulations that were made retroactive, which is technically not proper but in fact conferred benefits on members of the public or different groups of the public.

Mr. Kerrio: Or the government.

Mr. Chairman: Or the government, I suppose, Mr. Kerrio.

Interjection.

Mr. Chairman: I suppose that, practically speaking, they have no adverse effect, but it is within the ambit of our committee to point these out to the House. There are a couple of others with respect to the Ministry of Health, I believe: the words "and prior review by the minister."

The predecessor of this committee for many years, I understand, and this committee in the past have viewed those phrases as being redundant in so much as the regulations proposed by a particular ministry would in any event be submitted to the minister and submitted to the Lieutenant Governor in Council. We have pointed this out to various ministers in the past; some agree, as the Minister of Transportation and Communications (Mr. Snow) does, and some, as the previous Minister of Health, the member for Don Mills (Mr. Timbrell) pointed out, do not.

At this point I will turn it over to Mr. MacTavish. He can maybe expand on some of the points a bit further and then perhaps we will entertain questions of Mr. MacTavish, if any members have them.

Mr. MacTavish: Thank you, Mr. Chairman. Perhaps I should start by mentioning that there are a few editorial changes to be

made, which the clerk and I will make. These are brought about by the fact that this report was prepared some months ago for the previous House and therefore needs a little updating. That is purely editorial and is not any matter of substance whatsoever.

The report is quite simple, I think, and in order to avoid repetition, references are made to earlier reports where the subject matter has been gone into in more detail. It contains on pages 3 and 4 the statistics not only for the period of the last three months of last year--October, November and December--but also the statistics for the entire year of 1981 so that comparisons may be made with previous years. Therefore, our statistical picture is complete and up to date.

10:20 a.m.

The significant thing there is that the number of regulations filed last year was the lowest in the five-year period for which this committee and its predecessors have been responsible. Before that we do not have any figures at all.

Strangely enough, 1980--the year before last year--had the greatest number in the period. The committee says, in the middle of page 3: "It would appear that the sudden decline in the number of regulations filed was due in large part to the efforts made by the government during 1980 to have the ministries and agencies revise and update their respective regulations in order to have all in order for the general decennial revision of the regulations then under way."

I think that is an accurate statement of the reason for the decline. It will be interesting to see what happens this year; whether the number will slide back up over 1,000 or remain at a lower figure, say in the 800s.

As an appendix, the report contains summaries of the recommendations of the predecessor committee to which you have fallen heir as a result of all of the 1981 regulations. There is nothing new in any of them. They have all been done before.

Remember at last week's meeting of this committee we considered that the system was improving greatly because we only had seven regulations now when a few years ago we had 20 or more regulations that were considered to be irregular by the committee and therefore concluded that the process and examination by this committee was working well and serving a very real purpose.

However, as I point out, the five recommendations are--if you might excuse the expression--standard equipment that appear year after year, so we are not entirely healthy. We are making large strides towards--I won't say perfection but as close to that as one can hope for.

I think that is all I care to mention. If there are any questions, I will endeavour to answer them.

Mr. Chairman: Does any committee member have any questions or suggestions on the draft report or how it could be improved,

other than the comments that Mr. MacTavish has already made about improving the draftsmanship with respect to the fact that the report actually was prepared in draft form in February and we are now in another session?

Ms. Bryden: First of all, I have one very tiny question. When you referred to the fact that orders under section 30 of the Planning Act may no longer--this is on page 4. "The committee's recommendation to exempt section 30 orders under the Planning Act from the Regulations Act, if this is implemented (which is under active consideration by the Ministry of Municipal Affairs and Housing)." Is that section 30 of the Planning Act RSO 1980, because I do not think they were out at the time you drafted this report? Has the section number changed?

Mr. MacTavish: It will probably be changed. That is one of the editorial--

Ms. Bryden: I looked it up in RSO 1980 and I wasn't sure whether the section here that is section 30 is the one you are referring to.

Mr. MacTavish: That will be checked. That is one of the things. Also, in that same sentence, "which is under active consideration by the Ministry"--I don't know that that is true any more. It was true in--

Ms. Bryden: That is my second question. Does the draft Planning Act which is also before this committee deal with that particular exemption of section 30 orders from the Regulations Act?

Mr. MacTavish: I believe it does but I propose, as I did in February when this thing was being put together-- I will call the (inaudible), John, what's his name?

Mr. Kerrio: Williams?

Mr. MacTavish: No.

Ms. Bryden: The legal--

Mr. MacTavish: The legal beagle.

Mr. Barlow: John Bell.

Mr. MacTavish: Thank you. I will give John a call and see what the current situation is so that this report will reflect today not last February.

Thank you very much for bringing that to my attention.

Mr. Chairman: Those are two very good points, Ms. Bryden.

Ms. Bryden: I have some other questions, but maybe some of the other committee members want to ask some questions.

Mr. Chairman: Does anybody else have any questions?

Interjection.

Mr. Chairman: You can take that up with Mr. Kerrio, Mr. Barlow.

Mr. Runciman: I did not review last year's minutes, but when we discussed this I thought there were a number of concerns brought forward. Those have all been taken into account in this final draft, I see.

Mr. MacTavish: Yes, I think so. I am not aware of anything that--

Mr. Runciman: It seemed to me that we did have a fairly lengthy discussion. I cannot remember the specifics, but I thought there were a number of concerns raised at that time--

Mr. MacTavish: What about?

Mr. Runciman: --but maybe my memory is faulty.

Mr. MacTavish: Mine is worse than yours.

Mr. Chairman: I do not think it was with respect to this particular report that we discussed in February. It may well have been with one of our previous reports in 1981.

Ms. Bryden: When a regulation is supposed to be done with prior review or consultation, you comment that perhaps there should be a preamble to indicate that review has been taken.

Mr. MacTavish: No, may I interrupt you?

Ms. Bryden: That was a different one?

Mr. MacTavish: That is a different one.

Ms. Bryden: That was a precedent condition.

Mr. MacTavish: Prior review is one thing and the other thing is a condition precedent.

Ms. Bryden: I am sorry. Perhaps the reason I got the two confused is that I was wondering whether you had ever considered putting in some sort of a preamble to indicate the nature of the prior review or some verification of the prior review or what form this prior review takes when it is put into the regulation.

I understand the committee recommended that that be dropped from regulatory authority. I personally would not support that recommendation because the point is well made, particularly in the Health Disciplines Act and the Denture Therapists Act, that the council or the body administering it should consult considerably ahead of the time when they actually decide on the nature of the regulation. I think that is the reason why that was put into the legislation.

I would like to have this committee consider reversing that recommendation and to urge that prior review be put in where it is considered necessary, particularly when there is another body beyond the government or an agency of the government that would probably be drafting regulations. The same applies to the Urban Transportation Development Corp., which Mr. Snow comments on. He did not think prior review was necessary because they all came through him anyway. But the point is they come through him in their final form after the UTDC board has spent a lot of time working out the details.

I am wondering whether we could not have a discussion on whether we should reverse that decision. If I am correct the decision was that we do not favour having prior review mentioned in the enabling legislation.

Mr. MacTavish: I take your point. It is an iffy point, as this draft report points out. It depends on the minister's point of view.

The previous Minister of Health has made the point that the legislation may be of some help to him. Other ministers have taken an attitude that it is no help whatsoever; they simply issue a directive to their agencies and say, "When you are considering regulations I want to be in on it." Therefore, the minister is in the process from the very beginning. That is one point.

10:30 a.m.

The second point is that, when the legislation is drafted with prior review by the minister, what does that mean? It is an ambiguous phrase. Prior to what? What is review? Ministers do review and must review draft regulations that come to them from agencies, otherwise they would be in no position to present them to cabinet. They have to know what it is in there. That is the thinking, anyway.

Mr. Chairman: I think that the sentence on the bottom of page 8-- First of all, earlier in the page the Minister of Transportation and Communications indicates, "The point which you have raised appears to be a matter of drafting style and not of substance." I think, really, we have agreed with that, basically.

The last part of the last sentence in the draft report on page 8 says, "if anyone still feels the phrase in question to be helpful administratively they try to state the intent in clearer language," and I think that is exactly what Mr. MacTavish has just stated.

What does that phrase really mean? In practice there is no doubt that there is going to be some prior review by the minister, I would think in my own mind, anyway. It is a relatively redundant phrase; at least, that is what it appeared to be to the majority of the committee members.

Ms. Bryden: Following up on that, Mr. Chairman, the letter quoted from the Minister of Health--I do not think there is a date on it--said that the ministry "will certainly consider whether the words in question are still needed; if it is concluded that the words are no longer necessary we will be pleased to give effect to the committee's views."

Have we had any further communication from the Minister of Health since he undertook that consideration?

Mr. Chairman: No, we have not. I believe the Minister of Health has changed since that consideration was undertaken.

Mr. MacTavish: There will be an editorial change there to indicate that the minister has changed: "the then Minister of Health."

Ms. Bryden: Since we do have a new Minister of Health (Mr. Grossman), perhaps we should get a comment from the new Minister of Health on this matter.

Mr. Chairman: I would agree with that.

Mr. MacTavish: That may take some time. I would rather report the views of the previous Minister of Health, since we have them on record now.

Mr. Chairman: As far as the draft report goes I quite agree.

Mr. MacTavish: Then we can deal with the future as it comes up. I am perfectly satisfied that we will have more regulations made under this same formula under other acts. Therefore, it will be before the committee again.

Ms. Bryden: Yes. I think the new Planning Act, for example, requires consultation in a good many areas and it may be our proposal that the consultation or prior review be spelled out more carefully, and perhaps some process of verification that occurred could be added. It would be something that could be considered by this committee at a later date.

Mr. MacTavish: Mr. Chairman and members, there is an angle to this that you have just touched on, Ms. Bryden, and that is that we are getting pretty close to notice and comment when we talk about prior review by the minister or prior review or discussions by anybody. So from that point of view it is interesting.

Ms. Bryden: This is only notice to the minister rather than to the public.

Mr. MacTavish: Of course it is. But, the minister having taken the review, whatever review means, he may call in people who are advisers, and the advisers could be just as well outside the government service as inside the government service. It indicates that a check is being made, or it may indicate that. I do not know what it indicates.

Mr. Chairman: Thank you. Do any other committee members have any comments or questions?

Ms. Bryden: What is our conclusion regarding retroactivity? That we think the government should cease and desist from--

Mr. Chairman: I think all we really can do is point out that it is technically not proper or, if you will, legal, but that, practically speaking, where it confers a benefit on members of the public or individuals obviously nobody is going to complain.

Mr. MacTavish: Mr. Chairman, the Legislature has gone about as far as it can go. If you look at page i, order of reference, guideline d--and this has been adopted by the House: "Regulations should not have retrospective effect unless clearly authorized by statute." As I say, that is a guideline or a rule of thumb laid down by the Legislature and adopted by the Legislature on the recommendation of a predecessor of this committee. There it is. I do not know if there are any sanctions that can be laid on a defaulting ministry, except probably some words from this committee deploring it, perhaps stronger words than this report indicates.

Ms. Bryden: Perhaps we should consider that, Mr. Chairman. I do not know whether you want a motion that we consider it quite improper for regulations to have a retroactive effect.

Mr. Chairman: I think we have pointed that out--indeed, on the order of reference that Mr. MacTavish is just talking about--and we have pointed out that we find fault with four of the seven regulations we are dealing with because they are retroactive.

Mr. MacTavish: On the bottom of page 5, the last sentence says, "We can do no more than draw the attention of the ministry to guideline d, adopted by the House on December 13, 1979: 'Regulations should not have retrospective effect unless clearly authorized by statute.'" Then our references to earlier reports in other places in this draft report tie into somewhat lengthy comments about retroactivity and what the law is and so on. One could repeat all of those points in each of these reports, but it would seem to get a little tiresome. A reference back might be sufficient to jog the memory of the parties principally concerned with preparation and so on and promulgation of regulations. They are the people we really are aiming this material at.

I think I made as clear as I can the other day last week that retroactivity is something which I am afraid we must live with, people being what they are. If you run into a long weekend like last weekend, four days, and you run beyond the day of effectiveness of a proposed regulation, and it gives benefits to, let's say, a large number of the public by way of increased benefits under welfare acts and so on, it just could not be heard of that it could not start on the day it was intended to take effect. People would lose the benefit of the increase for, say, half a month or four days, as was the case over Easter. So things get caught in the machinery sometimes; it is unfortunate but unavoidable. I think it is a technical breach of the law in all likelihood. I do not think that it can be considered to be an evil of any sort at all.

10:40 a.m.

Mr. Chairman: Practically speaking it would be an unjust result if it was not allowed to be retroactive.

Mr. MacTavish: That is true.

Ms. Bryden: In some cases it may benefit people who need the benefit and in other cases it may benefit other people, giving them an advantage.

Mr. MacTavish: I think that if a regulation were passed and made retroactive that infringed on people's rights there would be a tremendous outcry, not only in the House itself but in this committee. I think it would have a special report, so to speak, drawing the attention of the House to that. But that is not the case.

Mr. Chairman: That has not been the case.

Mr. MacTavish: Not in the five years that I have been planning these regulations. I am sure there has not been a case where anyone's rights or privileges have been affected at all. I do not think any ministry would attempt it. The committee of cabinet on regulations would stop it right there. It would not get to be a regulation.

Mr. Chairman: Indeed it is the function of this committee to draw the House's attention to it.

Mr. MacTavish: That is right. That is what the committee is here for.

Ms. Bryden: And perhaps for the administrators to do a little more planning ahead so that they do not get caught.

Mr. MacTavish: Absolutely right.

Ms. Bryden: I have one other question about our guidelines that were adopted. Item h says that "Regulations should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like)."

Where does the ad valorem tax on gasoline and fuel oil come under that guideline? Are they not increasing a tax and is that not done by regulation?

Mr. MacTavish: In Ontario?

Ms. Bryden: Yes.

Mr. MacTavish: I do not know.

Ms. Bryden: Did any of the regulations come through in the last four months?

Mr. MacTavish: My guess is that it was all done by statute.

Mr. Chairman: I believe it was done by statute in the last session of the Legislature, if I recall correctly. I can recall certain members voting against that.

Ms. Bryden: Anyway, there are no regulations and it does not come under this committee.

Mr. MacTavish: No.

Ms. Bryden: I have one more question. On page 9, in reference to the regulation authorizing the $700 rebate of retail sales tax on the purchase price of certain motor vehicles, it is suggested that there should be a recital of the special circumstances. It seemed to me that reciting the special circumstances in this case would have been to say that the local automotive dealers needed bailing out of a high inventory. I doubt if the ministry would be prepared to put that in.

There seems to have been some evidence that the motor dealers considered they had received a nice benefit. What sort of special circumstances generally would you envisage? In this kind of legislation is it customary that authority is given in "special circumstances" without specifying the kinds of special circumstances?

Mr. MacTavish: It is not uncommon to have such a condition attached to the authority to make a regulation. We have had in this committee and its predecessors half a dozen examples of it or more. I am not sure that we have picked up all of them. We have picked up enough of them to make people perhaps a little bored with it, restating the point report after report.

I might say I do not think anybody has bought the point. There is no argument, in my opinion, as to the validity of a regulation that does not recite. I think it is perfectly valid. No one is under any legal obligation or duty to state the special circumstances. The point the committee has taken is simply that it would tie up the package neatly and tell the story completely.

It may well be that your example is a good one, that the government or the powers that be in the ministry concerned would prefer not to lay a finger on the particular reason, the special circumstance that brought about the regulation. It may be half a dozen different things and probably often is. So it might be very difficult to put down in writing, in a reasonable space, what all of those special circumstances are.

It was more a suggestion that might find favour in some circumstances. Obviously the ministries do not view it that way. They would much rather go ahead and simply act which, legally, in my opinion, they are perfectly entitled to do. So I think that is the end of it.

Mr. Kerrio: It may more properly be explained at the fund-raising dinner.

Ms. Bryden: I would certainly support the recommendation. I guess it is for the legislation to spell out the term "special circumstances" in more detail at the legislative end.

Mr. Kerrio: Do you mean you have not got a ticket to the dinner?

Mr. Chairman: I may agree, but it is not the function of this committee to point that out.

Mr. Barlow moves that we approve the draft report.

Motion agreed to.

Mr. Chairman: I have been advised that Mr. Anderson, the registrar of regulations, is tied up in a meeting so will not be available to give us a tour of the office of registrar of regulations this morning.

I know you are disappointed, Mr. Gordon, but perhaps you can contain your excitement until next Thursday, when we could perhaps have Mr. Anderson here at the outset to explain the function of his office and then see how the system works in practice

Ms. Bryden: What else is on the agenda for next Thursday?

Mr. Chairman: We will have Mr. Anderson give us a preliminary discussion from his point of view with respect to the topic of notice and comment.

We stand adjourned until next Thursday morning.

The committee adjourned at 10:48 a.m.

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

NOTICE AND COMMENT

THURSDAY, APRIL 22, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

CHAIRMAN: Eves, E. L. (Parry Sound PC)
VICE-CHAIRMAN: Barlow, W. W. (Cambridge PC)
Bryden, M. H. (Beaches-Woodbine NDP)
Di Santo, O. (Downsview NDP)
Gordon, J. K. (Sudbury PC)
Hennessy, M. (Fort William PC)
Hodgson, W. (York North PC)
Jones, T. (Mississauga North PC)
Kerrio, V. G. (Niagara Falls L)
McEwen, J. E. (Frontenac-Addington L)
Runciman, R. W. (Leeds PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

From the Ministry of the Attorney General:
Stone, A. N., Senior Legislative Counsel

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Thursday, April 22, 1982

The committee met at 10:15 a.m. in committee room 1.

NOTICE AND COMMENT

Mr. Chairman: I see we have a quorum. I would like to advise the committee that Mr. Arthur Stone, senior legislative counsel, will be here to give us his remarks with respect to notice and comment and we will have an opportunity to question him as we see fit. He is coming at 10:30. In the interim, our counsel, Mr. MacTavish, will give us some introductory remarks with respect to this subject.

I am informed, however, that Mr. Anderson, the registrar of regulations, is ill today and we will not be going on the tour of the regulations office as had been anticipated. However, we can set that up for next Thursday morning, and perhaps Mr. Stone's comments and the questions we may have will use up our time in any event.

Mr. MacTavish: Thank you, Mr. Chairman. As you asked for last week, I have put together some thoughts, notes and material in connection with sort of a broad, short introduction to the subject of notice and comment. If it is your wish, my comments might be transcribed and delivered to the members who are not here for their information. It might be a starting point for them as well as for those of you who are here.

Mr. MacTavish: The subject is not as new as one might think. Thanks to our clerk, Doug Arnott, and a lucky break I had a year or more ago down in Arizona--I had a chance pickup of a book on the signers of the Declaration of Independence, of all things. Books are scarce down there, except Zane Grey and people like that. I came across this rather interesting thing.

There was a gentleman by the name of Charles Carroll, who was an early governor of the then province of Maryland, a close friend of George Washington and the wealthiest man in the United States, who was a signer of the Declaration of Independence. He was quite a guy. He recorded, so far as I know--and I am astonished to find it--the earliest reference to what may be termed ultra vires regulations, that is, governing by delegated ordinances or regulations, or whatever you might call them.

On two or three occasions Doug Arnott has kindly written to the legislative library in Maryland without even an acknowledgement and also the library of Congress, which is a famous institution, without even an acknowledgement from them. I do not think they realize that Canada is up here and that we are interested in some of their historical monuments, or they are not allowed by statute or by regulation to deal with foreigners, I do not know which it is.

Anyway, the note I read in Arizona a year or more ago was that in 1773 this man, Charles Carroll, published a series of articles, and I quote, "denouncing government decrees without legislative action." So they were doing it then.

Ms. Bryden: They never learn.

Mr. MacTavish: I thought that was an interesting little note.

As the administrative role of government increased its sway over the lives of the citizens, so did the amount of delegated legislation. This development grew greatly in times of war, and by the time the Second World War came along, the governments at London, Washington and Ottawa, among other places, under special war powers, were publishing daily great volumes of regulations, proclamations, orders, rules and other forms of legislation which they had been delegated to make by their respective sovereign bodies, that is, Congress, Parliament and legislatures, whatever the name may be.

Because the system of governing by what is sometimes called secondary legislation found favour with governments, by the time the Second World War had ended these regulations had regulated most aspects of peoples' lives. The flow of regulations continued until today it is admitted by all authorities to be here to stay. The only matters left open are how properly to operate and control the systems. What checks are expedient to ensure that the delegatees of legislative powers stay within the limits of their authority? Who shall perform these checks? What type of body should be the watchdog?

It is now generally accepted that the sovereign body that delegated the powers should by some practical means be the body to police the products of the delegatee and that there should be an appropriate system for the central filing of regulations that affect the public generally and for their publication at a time and by a means that they may be available to everyone as quickly as possible.

Most authorities agree that central filing and publication in one way or another, as is now being done in most jurisdictions similar to our own system here in Ontario, has met with general satisfaction. However, in the view of some, these systems do not go far enough in that they operate only after the regulation is made and enforced.

10:20 a.m.

These people advocate that the present system should be extended, or a corollary system established, to enable proposed regulations to be made known to the public and an opportunity afforded to people to make representations pro or con at some form of hearing, the so-called notice and comment procedure. So much for general comments. I find it somewhat difficult to be brief, but I think that is probably what you wish.

Turning to the situation in Ontario, it may be helpful to examine briefly the day-to-day operations of this system here. What is going on today, within the Legislature, the government, and its agencies, with respect to notice and comment? There may be more, but I would like to draw your attention to two precedents, both of which, in my opinion, are good precedents and perhaps show the way in which we should develop the procedures of notice and comment.

One of these is statutory; the other is an established practice. Both are working well and to the general satisfaction, I think I may say fairly, of all concerned. The trail-blazing statute here is the Occupational Health and Safety Act, which I am sure you are familiar with, first enacted in 1978. This particular modern Ontario statute has, in express terms, adopted completely the doctrine of notice and comment.

To bring the point into focus, pardon me if I must recite some of the act's provisions. I quote section 1(6), the section that opens up the act and defines expressions and terms used in it. Number six is "designated substance." It "means a biological, chemical or physical agent or combination thereof prescribed as a designated substance to which the exposure of a worker is prohibited." I am paraphrasing for brevity.

Section 41(1) of the act is the regulations section. "The Lieutenant Governor in Council may make such regulations as are advisable for the health or safety of persons in or about a work place." Section 41(2)(14) says: "Without limiting the generality of subsection (1), the Lieutenant Governor in Council may make regulations, prescribing any biological, chemical or physical agent or combination thereof as a designated substance."

Now we come to Section 22 of that act, which is all-important for the present purposes. It reads: "Prior to a substance being designated under paragraph 14 of subsection 41(2), the minister," and it appears there are two prongs to this requirement, (a) "shall"--it is mandatory; he must--"publish in The Ontario Gazette a notice stating that the substance may be designated and calling for briefs or submissions in relation to the designation; and" (b) "shall"--again, he must do it--"publish in The Ontario Gazette a notice setting forth the proposed regulation relating to the designation of the substance at least 60 days before the regulation is filed with the Registrar of Regulations."

Pursuant to this legislation, the Minister of Labour is an illustration of how the thing works. The Minister of Labour published in the Ontario Gazette on June 28, 1980, a notice of intention to designate certain substances to which the exposure of a workman is prohibited. A copy of this notice is here and takes a full front page in the Gazette. It looks like that.

"Proposed regulation under the Occupational Health and Safety Act, 1978: Ministry of Labour. Notice of proposed regulations." Then it tells what the regulation proposes and what it intends to do, signed by the minister. "Comments on the proposed regulation or any particular sections may be addressed to:..." "Comments received may be made available for public examination."

That was the first step under this legislation that must be done. Then the proposed regulation was published in full in the Ontario Gazette with notice to the public again that it would be processed and brought into force 60 days after the publication. It advised everyone that comments on the proposed regulation could be sent to a specified official in the Ministry of Labour. That notice and the attached draft regulation--if I may call it that, in this particular case--occupied more than 70 pages of the Ontario Gazette. That is quite an effort, but it was laid out in full.

Later on, I expect this committee will have before it a witness from the Ministry of Labour to testify how this procedure is working. As far as I know, it is working very well indeed and serves the purpose. The regulations, when they are finally made, do the job as intended.

Mr. Kerrio: Of course, this particular area is one that, it goes without saying, should have a great deal of input because of the seriousness and the acceptability of some of the things you have mentioned. There may be other areas where a regulation may not have the impact that this does on the individual. In keeping with the expediting of something, it may be in the best interests to have it done by regulation. I agree you have touched on a subject that needs input every step of the way. That goes without saying.

Mr. MacTavish: You are absolutely right in my opinion.

Mr. Kerrio: Yes.

Mr. MacTavish: It is only in the particular kinds of legislation that this treatment is needed.

Mr. Kerrio: Yes.

Mr. MacTavish: Certainly not on all. The other of the two precedents I wish to put before you this morning is the practice that has been established by the Ontario Securities Commission without any statutory, regulatory or other form of direction of any kind. It is advertising its proposed regulations widely among the securities industry, circulating copies of the draft, inviting comments pro and con, holding hearings for any person who may testify and finally making regulations that are well known to all in the industry.

I might even go further and say all who are interested have had the opportunity of perusing and contributing their views, critical or accommodating. It is generally agreed by all concerned, both in government and in the securities industry, that the end product of these procedures has greatly improved the former system by the proposed regulations having been put through this public scrutiny.

Without going into detail at all, the system prevailing now in Ottawa is very much the same as it is in Ontario. They have a number of statutes now--the Broadcasting Act is an example--which require publication of intended regulations, public hearings and so on before they may be made. That system is working there. They also did have some thought of developing that system further.

10:30 a.m.

Mr. Kerrio: Excuse me, I have to make a comment. The system as it relates to that particular area is like the tail wagging the dog.

Mr. Chairman: Thank you, Mr. Kerrio.

Mr. Kerrio: I didn't think you would want to say that earlier.

Mr. MacTavish: That is your comment, not mine. With your permission, I will pass on the United Kingdom because it is so involved. Let me put it this way. Over the years they have tried various systems of dealing with notice and comment and, for one reason or other, have thrown them out. Now they are struggling with committees trying to get a system that will work.

The United States for some years now--about 30--has had a system under a statute called the Administration Procedures Act. It requires proposed regulations to be published in the Federal Register, a daily newspaper published in Washington. It turns out pages and pages of these proposed regulations. The system is not working too well because there are so many exceptions. The back door is wide open and most people in the regulatory field there run through the back door and escape. For that reason, what gets into the Federal Register day by day is a very limited corner of the entire field. However, it is in place and has been working since just before the last war.

Australia tried it without much success and has given it up. The problem is that where you have general rules covering this field of delegated legislation, you must open a back door by necessity. You must let out certain emergency matters and other matters of prime government policy where you do not want to announce it before it hits. There are so many of those things that there is very little left for the general run of publication, notice and comment.

I brought along half a dozen or more documents of recent origin that deal with the subject. I think you have some of this material.

Mr. Kerrio: This isn't of interest. This has to do with the same material.

Mr. Chairman: If I may interject for a moment, Mr. MacTavish, would it be possible for you to supply committee members with a list of these articles and the articles themselves, if committee members do not already have them, so that they may peruse them before next Thursday? I think we should fairly shortly go on to Mr. Stone's appearance before the committee, seeing that he is here.

Mr. MacTavish: Mr. Chairman, I would be happy to go along with that.

Mr. Chairman: If that is acceptable, do you have any other comments you would like to make before we proceed to do that?

Mr. MacTavish: No, that is fine with me.

Mr. Chairman: Is that acceptable to the rest of the committee? Thank you.

We have Arthur N. Stone, QC, with us. Mr. Stone, welcome to the committee. We are pleased you could attend today. Mr. Stone is, as I have indicated earlier and for those of you who may not know, senior legislative counsel, Ministry of the Attorney General, and former Registrar of Regulations, I am told by Mr. MacTavish.

We are starting out on this rather broad and wide-ranging subject of notice and comment. We would like to get from you, if possible, your remarks or comments with respect to the same. There may well be several committee members who have questions to ask you at the end of those comments. If that's agreeable to you, we would ask you to proceed.

Mr. Stone: Thank you, Mr. Chairman. First, I'd like to say that the principle of notice and comment doesn't really affect--at least I do not see any difficulty with it--the internal operation of our office. The process of drafting and filing them and the rest of it is not affected. The only rider I would put on that is that I think it's necessary that before anything is distributed, it should be finally drafted and not distributed in a preliminary form, but should be ready to go to cabinet in a final form before it is distributed so that it does not come to us for drafting after it has been out and everybody has taken the trouble to look at it.

After that point, all I can do is make some observations or comments, as an observer on the scene, as to possible practical problems, particularly in relation to things the ministries might have. As Mr. MacTavish has indicated, regulations are frequently of a particular kind, that is, affecting a particular industry, affecting a particular identifiable group of people with whom the ministry is normally dealing from day to day. Those are very commonly distributed, or outside comment is asked for, before they are passed. That just applies to a certain group and depends upon the situation in the ministry.

If there were a requirement for a notice and comment, there would need to be certain exceptions, as Mr. MacTavish has said, because of the nature of many regulations. They can range from the designation of fire districts in the north during the forest fire season where overnight an area may need to be closed to the public--those would need to be done immediately--through hunting seasons, because that kind of policy would require review by the public reports before it gets implemented, designation of controlled access highways or speed limits. There is such a range of various things and various degrees of appropriateness. There would probably need to be some form of identification of the kinds of things these would apply to.

There are ways of doing that. One is to try, in one place, to describe or identify what requires notice and comment. The other is to accompany each delegated authority with a notice and comment provision applicable to the appropriate parts of it. The trouble with the latter is that the bills are essentially drafted on the

instructions of the ministry and they tend not to be too vigorous about what is not too comfortable for them. So there may not be the incentive for taking an initiative there. That would be a clean way of doing it if it could be put in the proper places.

10:40 a.m.

Theoretically, we must remember that once a regulation has received a notice and comment procedure, every amendment to it would need to do the same. Even if an unforeseen difficulty arose which required fixing, if it had received the endorsement of notice and comment, one could not very well change it without going back through the same thing. So that gets into the element of time which underlies the concept. As far as ministries are concerned, I think you will find the passage of time is destructive on occasion.

That is about all I can say, Mr. Chairman, unless anyone has questions.

Mr. Van Horne: I am just curious about your statement about people who draft. You used words which I thought were rather interesting. You said they were not very vigorous in their concern with the effect of what they will present. Is that what you intended to say?

Mr. Stone: I did not mean it in that general way. I think basically the scope and the policy of what is wanted in a bill is determined by the ministry itself. I believe when we enter the notice and comment area, it starts out being a nuisance. I think certain ministries are doing it now in some plain subjects. If it were seen as the policy of the House, they would probably put them in. But there is no way to police it. I am not sure how you would find some way of picking right things. Of course, it is subject to comment in the House.

Mr. Van Horne: I guess that would only be evident once the process started rolling and you got into some cases or some specifics.

Mr. Stone: Yes. I do not know. I suppose there ought to be some strong declaration of what the House expects in order to have some effect.

Mr. Van Horne: We might wait a long time to get that.

Mr. Kerrio: I do not know, Mr. Stone, whether you heard some of the comments made by Mr. MacTavish. He was describing one area where it goes without question that notice and comment and real input should be involved: the health of the province as it relates to the workplace.

You have described some that are at the other end of the spectrum, you might say, so there is a wide range. Instead of attempting to impose some kind of perusal that would cover such a wide spectrum, I wonder if we could have a committee to look into the wide range of areas that would be covered by such orders and decide which ones should go for very active perusal by members of the Legislature and the public. I wonder if that may be the direction we might be headed in. Is there a jurisdiction where they may have considered such an involvement as it relates to regulations?

Mr. Stone: I suppose this would arise at the time a bill is going through the House. I understood that now at least the regulating sections of bills can be referred to this committee and that part a committee could say: "Yes. We want to amend this section by requiring notice and comment on these clauses." I think that is feasible.

Mr. MacTavish: On the point that the member raised, I might refer to former Chief Justice McRuer in his famous report--it is 12 years old now, I see--where he says at page 367 of chapter 25, "If all regulations were required to be laid before the Legislature of Ontario for approval before becoming effective, or to be subject to a resolution of the Legislature which could disapprove of them after their becoming effective, the exercise of subordinate legislative power would be destroyed for practical purposes."

May I have your comment on that, Mr. Stone?

Mr. Stone: I think it would if it applied to the law.

Interjection.

Mr. MacTavish: That is right. Yes. It would appear that a certain selectiveness must be needed in this field.

Mr. Kerrio: That selectiveness is what I would like to try and zero in on.

Mr. MacTavish: Perhaps, Mr. Stone, I might refer you to another paragraph in McRuer. This is at page 364. He says: "We have concluded"--this is his royal commission--"to have advance publication of regulations before they are made is not required in Ontario as a necessary safeguard of the rights of individuals who may be affected. Compulsory antecedent publication and consultation would cause unnecessary delay and merely duplicate the time already spent in informal consultation." This is the point you have made. "The publication of regulations immediately after they are made would appear to ensure adequate publicity."

That was written before the Occupational Health and Safety Act and the procedures that it has developed of requiring by statute notice and comment. I think if that had been in place at the time the McRuer report came down, those qualifications in appropriate places would have formed part of the report.

Ms. Bryden: Mr. Stone, how do you feel about the arguments in favour of notice and comment that you will get better rules because of public participation in the process because rule-making agencies cannot be all-knowledgeable and they may not be alert to possible defects in the regulations, and also that the public participation would be a sort of counterbalance to the participation of the internal bureaucracy and therefore you might get a more balanced approach?

Those are some of the arguments I know that are used, particularly in the United States, where they use a considerable amount of notice and comment. Do you think those are important considerations that would lead you to think that in some cases there might be an advantage in having them?

Mr. Stone: Yes. I think there are many areas where it is essential. They may fall into different categories. One is where the ministry is dealing from day to day with an industry or, say, it is the Business Corporations Act or the Securities Act where they are constantly dealing with one segment of the population. Their relations with that industry and the amount of expertise there is in the subject makes it essential for them to consult, or to show what they are doing, obtain criticism, obtain improvements, just like with the bill which, after it goes to committee and it gets input from the public and the members, is improved. You get the same with those regulations.

10:50 a.m.

Another class, of course, is that in which there is a very, very lively public interest, such as with environment things, for a little different reason. It is not because of the expertise, it is a way of reflecting the public expectation. I think those are appropriate.

The problem is to select which ones would be only going through a formality which is not valid or does not really perform a function, just because the rule says you have to do it.

Ms. Bryden: I take it then you feel it is important in certain areas. It is a matter of selecting the areas where it is important and the circumstances of how much the public is affected by the particular regulation and how much they have to contribute, as well, to the input.

With regard to the securities commission, Mr. MacTavish mentioned that there was no legislative authority or requirement for such consultation, but it is done as a matter of practice. Do you think it should be made a legislative requirement, since it appears to be of such great importance, to involve the people in the industry in those kinds of regulations? There may be a securities commissioner who at some time might decide he did not wantto be bothered with the delay that is caused by that process or with the other administrative problems. Do you not think that there should be legislative authority for this practice?

Mr. Stone: It would remove it from discretion. I am not sure whether, under the Securities Act, there are not some things that would destroy the subject matter if they could not act immediately for the protection of the public. I think the way the chairman of the commission would see it is that for the mechanics of a regulatory system he has to live with the industry and it would be far more uncomfortable for him to go off half-cocked and find that it was unworkable than it would for him to take a more political approach and sound out the practicality of it before he makes it final.

Ms. Bryden: Is there not a danger, which you commented on in passing, that once you have adopted this practice, if you want to make any amendment to the securities regulations, presumably you should go through notifying exactly the same people who were notified in the initial consultation, otherwise it might be considered invalid? Therefore, if you had statutory authority you would be required to notify the same people.

Mr. Stone: Yes, you would, and likely properly so if the amendment was substantive enough, but there are all shades.

Ms. Bryden: I think something we should look at is the problem of amendment of regulations which have gone through a notice and comment process and whether you have to go through the identical process when you amend it. I do not know whether Mr. MacTavish has a comment on that at this moment.

Mr. MacTavish: Off the top of my head, for what it may be worth, I would say the system now in place with the securities commission is, if you like, a voluntary system. They do it as a matter of practice, they do not have to do it at any stage with any regulation. I would think that if they go through this drill of notifying the industry and having meetings and all this stuff on the original thing and then they decide they want to amend it next month, I think they can go ahead and do it without any of that machinery, without affecting it politically.

It might be bad business and it might backfire on them and cause a lot of further trouble with the industry, but I cannot see that it would affect the validity of the amending regulations. There has been no legal process to begin with. It seems to me they could do as they wished, but I think ordinary judgement would rather dictate the sensible, practical course of action, and that is calling the same people for consultation.

Ms. Bryden: I take it that is an argument against formalizing the procedure. Is it not possible under some principle of natural law that a security dealer could claim the amendment was not put through with the same ministerial practices of the original and therefore his natural rights have been violated?

Mr. MacTavish: As the chairman mentioned, an amending regulation is a new regulation. It is another number and another place in the filing system in the registrar's office, so it in itself is a new regulation. Therefore, it might be said the same procedures, formal or informal, should be gone through.

But let me point this out. I think it is good law. McRuer in his report laid it on as good law. There is no common law in Ontario requiring, let us call it, natural justice--that is notice and things of that sort--before action is taken. There is no law to that effect in Ontario, so that principle underlines this whole area. I do not know whether that helps you, Ms. Bryden.

Ms. Bryden: Do you think it would be worth the committee's while to ask Mr. McRuer to appear to see, in the light of what has happened since his report came out and the adoption of the notice and comment practice in some areas, whether he feels he would recommend formalization of it in those areas and related areas or whether he still feels the informal consultation takes about the same time and achieves about the same effect? I think that was his conclusion.

Mr. Chairman: I would think, subject to what the committee has to say, we would probably welcome the opportunity to invite Mr. McRuer to appear before us, provided he is able to do so and can fit this into his busy schedule. Mr. MacTavish, if the committee members are in agreement, would you undertake to make that contact?

Mr. MacTavish: Yes, I would be very happy to. I think the former chief justice would be pleased to have an opportunity to update his views. As far as I know, he is still in Florida. I have not heard of him coming back but he has been down there all winter. If it is the committee's wish, I would be happy to get in touch with the judge and see if he is home and, if so, whether he would like to attend.

Mr. Chairman: Thank you. Perhaps that contact will have been made by next Thursday and we can see what comes as a result of your discussion.

Mr. MacTavish: Since this is a proper function of Mr. Arnott, I will collaborate with him on the program.

Mr. Chairman: Certainly, do not ignore Mr. Arnott by any stretch of the imagination. Are there any further questions of Mr. Stone while we have him here?

Ms. Bryden: Do you know why the United Kingdom repealed its law on this?

Mr. Stone: No, I do not.

Ms. Bryden: I presume we will be getting some more information on the UK and probably on the US

Mr. Chairman: Yes, we will, I am told by Mr. MacTavish.

Mr. MacTavish: Can I read you a paragraph on that? The answer?

Mr. Chairman: Please go ahead.

11 a.m.

Ms. Bryden: Is it in this document?

Mr. MacTavish: I am quoting from the McRuer report. "In the United Kingdom, the Rules Publication Act, 1893, required publication of certain regulations more than 40 days before they were made, with information as to where copies could be obtained and

provided for representations by public bodies. This provision was repealed by the Statutory Instruments Act, 1946." It was in effect for some 50 years. I would think that is a pretty good test.

"The appeal was justified on the ground that the provision had never worked satisfactorily and that informal consultation had become virtually a constitutional convention, rendering a formal requirement redundant. Although delegated legislation was one of the two major matters considered and referred to by the Donoughmore committee in 1932. Professor Wade informed us that no pressures existed for reconsideration of the problem by the Franks committee and that there appeared to be little demand for any change in the present practice."

I might just go on with the next thought: "Similar publication was formally required in Australia, but the practice was abolished in the emergency of the First World War and has never been re-established." Perhaps I should add the caveat that this is 12 years old. I am sorry, I do not know what changes have been made in Australia.

Mr. Chairman: I believe Mr. MacTavish will be circulating this information to the committee members--those of you who do not already have it from the last session--prior to the next meeting so you can review it at your leisure. If there are some things you do not have complete copies of, Mr. Arnott will be pleased to see that you do get them if you want to.

If there are no other questions of Mr. Stone, I think we should thank him very much for appearing before the committee today and allow him to get back to his duties. Thank you, Mr. Stone.

Mr. Stone: Thank you.

Mr. Chairman: Next Thursday I presume we will have Mr. William R. Anderson, QC, here.

Interjection: Hopefully.

Mr. Chairman: Hopefully, and we will be able to tour the regulations office. By that time we should have, as well, a transcript of today's proceedings. We should have had an opportunity to review Mr. MacTavish's material and publications and perhaps have some further comments with respect to it. We, hopefully, will know the whereabouts of former Chief Justice McRuer and when he will be able to attend. Thank you very much.

The committee adjourned at 11:03 a.m.

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

ONTARIO SECURITIES COMMISSION

THURSDAY, MAY 6, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

CHAIRMAN: Eves, E. L. (Parry Sound PC)
VICE-CHAIRMAN: Barlow, W. W. (Cambridge PC)
Bryden, M. H. (Beaches-Woodbine NDP)
Di Santo, O. (Downsview NDP)
Gordon, J. K. (Sudbury PC)
Hennessy, M. (Fort William PC)
Hodgson, W. (York North PC)
Jones, T. (Mississauga North PC)
Kerrio, V. G. (Niagara Falls L)
McEwen, J. E. (Frontenac-Addington L)
Runciman, R. W. (Leeds PC)
Van Horne, R. G. (London North L)

Substitution:
Miller, G. I. (Haldimand-Norfolk L) for Mr. McEwen

Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

From the Ministry of Consumer and Commercial Relations:
Boast, K. E., Legal Adviser, Ontario Securities Commission
Bray, H. S., Vice-Chairman, Ontario Securities Commission

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Thursday, May 6, 1982

The committee met at 10:18 a.m. in committee room 1.

ONTARIO SECURITIES COMMISSION

The Vice-Chairman: We will get today's meeting under way. Mr. Eves, our chairman, had responsibilities he could not avoid in his riding and asked me to take over for him if he did not make it. Obviously he is not here, so we should get the meeting under way. We have two representatives here today from the Ontario Securities Commission as witnesses before our committee. I will ask our legal counsel, Mr. MacTavish, to introduce the two gentlemen.

Mr. MacTavish: Mr. Chairman, members of the committee, we have Mr. Harry Bray, QC., who is now the vice-chairman of the Ontario Securities Commission. He has been with the Ontario government service for many years and is a career expert on securities. He has with him the legal adviser for the commission, Mr. Keith Boast--not that Harry expects to need any legal advice, but it is nice to have a back-up man present. Mr. Bray, as I have indicated, has been with the commission some considerable time. How far does that go back?

Mr. Bray: Since 1951.

Mr. MacTavish: Mr. Boast, I take it you have not been with the commission that long?

Mr. Boast: Not that long, sir. I have been there since 1973.

Mr. MacTavish: The committee is concerned with the subject of notice and comment, so-called. We are only concerned with regulations and other statutory instruments. So far the committee is concerned only with regulations. The question is, should some system be introduced in Ontario dealing with regulations before they are made? In that way, there might in some way be public or official scrutiny of them before they are made.

As you know, the system in Ontario at the moment is more or less the same as in Ottawa. For example, the Ontario Occupational Health and Safety Act, a relatively new statute, has laid down in peremptory terms the fact the minister, before making any regulations, must publish notice of his intent. Not only that, he must publish the draft regulation in the Ontario Gazette, and then proceed to have a hearing for anyone interested in promoting or objecting the contents of the proposed regulation. In that way, the product is thought to be more likely acceptable generally than without such procedure. The bugs are worked out of it, so to speak.

The other alternative in Ontario at present, and what I understand is the vogue, is the Ontario Securities Commission under which, when they have regulations in mind, they notify the

securities industry of what is in the wind and ask them to attend a meeting. The subject matter is discussed freely and a consensus reached as to the wisdom of the proposed move. That, as I understand it, is done without any directive or statutory backing. It is done as a matter of practice in the circumstances where new regulations are envisaged.

Mr. Bray has kindly consented to come here today although Thursday is the day the commission meets. He has absented himself from today's meeting of the commission in order to be here. I am sure what he will have to say on this subject will be interesting to the members of your committee. Mr. Bray, with that preamble would you please describe in your own way the procedure in place with the Ontario Securities Commission?

Mr. Bray: We are fortunate in that we have a vehicle for disseminating requests for comments. We publish a weekly bulletin which we used to circulate to all the members. Some of you felt they did not have time to read it, so you may not be getting it. We would be pleased to put any of the members back on the mailing list if they would like. We do have a vehicle through which we can publish. In that bulletin we have a section called notices or requests for comment.

With respect, Mr. MacTavish, we do a little more than you indicated. In the last while we have published a draft regulation. The reason I asked Mr. Boast to be here is that he has been actually putting together the cabinet submissions and dealing with the regulation council and so on. We come up here for whatever reason we think there ought to be a new regulation. We put it in the proper form to make sure we are not offending against proper drafting and we make sure it makes common sense and that we do have the power, if the Lieutenant Goveror in Council agrees, to pass the regulation. Mr. Boast goes across to council and checks the forms before we expose it.

Mr. Boast: That is correct, sir.

Mr. Bray: At that point we draft a notice for comment with a preamble explaining what we are striking at, what we hope the new regulation is striking at and what it is intended to do. We have a functionary called the secretary who is an officer and secretary and we ask that all comments be returned to the secretary within a period of time.

Usually in a case like that, we allow upwards of two months for comment to the secretary. When that time has passed, the comments are examined and reviewed and you can tell from the source of the comments whether you ought to have a public hearing. We have had public hearings on rare occasions, where the regulation proposed is of widespread general interest to investors, people in the industry and so on. We give notice of that public meeting and we have a little boardroom where we can have these meetings.

If it is of interest to specific segments of the industry--it might be the borough, it might be the county profession or it could be the Toronto Stock Exchange--then we will hold meetings with them and hear what their inquiries are. I do not want you to get the impression they are cosy little tête-à-têtes because they are not.

We offer them an opportunity to be heard. We listen to views, try and weigh them, and then take into account the pragmatics of what they have to say and try and reflect that in the draft regulation.

At that point, the minister may not be involved at all. In fact, he usually is not with us. When we recommend it to the minister, of course it becomes a government matter as to whether the government will sponsor the regulation or not.

In general terms, that is how we operate.

10:30 a.m.

Mr. MacTavish: How many times does this procedure come into play?

Mr. Bray: We had had a new act come into force a couple of years ago and we had a huge batch of regulations. We had a lot of public meetings and it was fairly thrashed out by all interested parties through a variety of seminars.

It does not come into play that often. We have a package of amendments to the Securities Act and amendments to the regulations of that act which we publish for comment. There is the Commodity Futures Act. Do you know that act, Keith?

Mr. Boast: Yes.

Mr. Bray: Keith is more au fait with what we have got currently. It does not happen that often. More often the things that you are likely to see us engaged in involves what I call policy. Under the legislation, the commission is vested with a good deal of discretion--how to act in certain circumstances.

The professions in the industry, those affected by the act itself, many years ago made it clear that they wanted to know that we were not acting quixotically and that we would act consistently under a given set of circumstances. To assist those involved with us, we have a policy-making system which parallels very much the system I have just given you, in which we state how we are likely to behave in a given set of circumstances.

That is not regulations and that is not law, but it does indicate to people who deal with us that if you behave in a certain fashion, if you put a prospectus in with certain safeguards in it, the likelihood is that you will get favourable consideration. If they are lacking, then the corporate finance people will examine it with a microscope. That process which, arguably, is similar to the rule-making process that some of the administrative bodies have in the United States--without the same legislative background--has enabled us, with the assistance of our colleagues across Canada, to come up with what we loosely call "national policies."

That enables people who are filing in more than one province to get sort of a consistency of treatment by each of the provincial administrators. Securities regulation in Canada is a provincial matter; at the moment the federal government has not intervened. So people who are dealing on a national basis would like to be dealt with consistently by all the administrators.

We meet twice a year--indeed the meetings just finished yesterday--and try to agree on how we behave in the exercise of the general discretion which each administrator is given under his legislation. Am I making much sense or am I just talking here?

Mr. MacTavish: Yes. If I may say so, that is very interesting, but may I bring you back, Harry, for a moment to the regulation-making situation?

Mr. Bray: For instance, we put a regulation out not so long ago on two things. I guess they got us a lot of publicity all right but not the kind we were looking for. One was a proposed regulation on increases in fees. We put that out for comment to see what the people who were going to be affected by it and who would have to pay the fees thought about it.

At the same time, and this was back in December, we published a broader concept--user pay--which is a very popular topic across North America, not just Ontario, to try to make sure that the user of the system, or its beneficiary, pays the full costs of operating it. If any of you have looked at the blue book, you will know there is a shortfall between the revenue that is produced by the fees collected under regulations in the Securities Act and what we are actually spending.

The second, the user pay proposal, was put in rather Draconian terms. It was really framed in such language--and I do not take any credit for the drafting--that it was meant to evoke comment. It is like the old story about getting the mule's attention by hitting him on the forehead with a two-by-four. It certainly did that and we got some very public comments from the Investment Dealers Association and the Toronto Stock Exchange which felt that we were trying to throw a burden on the industry which they did not feel was warranted.

That was just sort of an early warning shot; it was not meant to be the basis for a firm proposal because I think if it had been our minister would have been quite properly entitled to say some harsh words. Perhaps he did; I do not know. Not being the chairman, I do not get all the harsh words. It evoked comment.

On the other one, the fee structure, we did get comment from people who were affected by the proposed increases in fees. We were playing catch-up. We had not had a regulation on fee increases; some of them, Keith reminds me, had not been changed for 30 years. The salesmen's fees, the licensing or registration fees, had not been keyed to cover inflation for a decade or more. So the increases proposed were fairly substantial.

We have got the comments. The regulation will be revised--and has been revised--in light of the comments and has now for the second time been submitted to our new minister, Dr. Elgie. There was a proposal on fees submitted the previous June to Mr. Walker and it had not gone forward. He, I think, wanted a testing procedure greater than he felt we had given it.

We have given it that, and given it our best try, so now we have advanced the regulation into--is it fair to call it a sausage machine? There is a procedure that you have to follow once you put foward--

The Vice-Chairman: A rose by any other name.

Mr. Bray: I go back to my army days where we had a procedure we had to follow. We used to call it the sausage machine. We would put it in and the sausage would come out the other end--sometimes.

Mr. MacTavish: Thank you very much. The question in my mind is that this procedure, from what you tell me, is not called into play too often because regulations are not made every day.

Mr. Bray: That is right.

Mr. MacTavish: A few times a year maybe.

Mr. Bray: We would not be doing it that often. Keith is getting me to what I thought was obvious, that every time we propose a regulation we have been publishing and getting comment, but as to the numbers of times, you are quite right, it is not too often.

Mr. MacTavish: What I was leading up to was this question: Are there occasions in this procedure, which everyone in the industry recognizes, I think, from what you say, as a good system, even though it has not the benefit of statute behind it or any other formality, when the commission must move more quickly than the procedure permits?

Mr. Bray: There is no question about it. I guess the extraordinary one, and some of you may or may not remember it, goes back as far as 1971. This is when the foreign ownership regulations came into play. Merrill Lynch had purchased one of Canada's largest old line underwriting firms, Royal Securities, and the securities industry became greatly alarmed that it was going to be overwhelmed by the great American giant.

They set up a foreign ownership study under the then retired president of Imperial Oil and they came to the conclusion, in effect, that foreign-owned dealers should be expelled from the Canadian marketplace. That seemed to be a bit overwhelming. The need for some restriction on new foreign brokers was made apparent, but the extent to which the industry was prepared to go, as evidenced by the noises they were making publicly, seemed a bit much. The government was requested by the commission to pass an interim foreign ownership regulation, which was brand new, which it did very quickly, to lock the situation in place and to permit it to be studied as it was subsequently, publicly, with a report being published on the subject.

In that case it was essential that the regulation be put through quickly and this notice procedure came after the fact rather than before the fact. The regulation was a holding regulation, if you like, a tough one, but a holding regulation, and then all the

comment--the public hearings and the comment--came afterwards. The result was a report on nonresident ownership, as the report was called subsequently.

Yes, there are occasions. I can recall, dredging back into history, when the Paperback and Periodical Distributors Act was being considered, and there was concern about the paperback and periodical distribution system becoming a monopoly in this province and its being taken on by people with sort of an unhealthy background or association. Perhaps none of you will remember that with the exception of Mr. MacTavish.

The regulation-making powers were used very quickly again to stop a single entity, which to my recollection was out of St. Louis, Missouri, from tying up all the paperback and periodical distribution in this province. They were buying up these little distribution firms one by one and it almost got to the stage where the only person who would be distributing Playboy magazines and anything else they happened to want to distribute would be this one company. They had to act quickly.

If I could summarize it, if it is suggested that this procedure ought to be enshrined in some way, I would ask you sincerely to make sure there is a safety valve in there so that we are not obliged under all circumstances to go through this notice procedure. We are glad to do it and we think it makes good sense, but I suggest to you, make sure there is a safety valve.

10:40 a.m.

Mr. Van Horne: Could you elaborate on that?

Mr. Bray: I thought I had. I mentioned the foreign ownership.

Mr. Van Horne: The safety valve requirement. Mechanically, we are not all legally trained, so we could stand a little--

Mr. Bray: You cannot make it so rigid that the people responsible for making regulations have to go through a notice period and a comment period and so on. If you lock them into that, you practically take away the capacity to govern.

If there is a need, let us say, under the Hazardous Products Act--and I am talking over my head now--supposing there is a new poisonous toxic substance that has to be banned quickly and it has just become apparent to the scientists that it needs banning. A report comes out and there is a need to stop the sale of this product quickly. If there is a regulation-making power to do that, to put that through the notice-making power prohibiting the potential harm to continue, the regulations--

Mr. Van Horne: So in the actual writing you would have a statement, "Notwithstanding all of the above, in the case of an emergent"--whatever--somebody has the authority to move without notice. Is that it?

Mr. Bray: Right now, of course, the Lieutenant Governor in Council, really the cabinet, has the power in the end result to make regulations. He who wears the crown must also wear the thorns, and vice versa. If you are going to give him the thorns, he should also have the opportunity, I would think, of meeting a hazard like that or meeting an urgent public need.

You should not completely take away the discretion of the regulation-making power and lock it into a rigid format. Set down a rule, by all means, a general rule with which people developing regulations ought to comply--notice period, comment period--but with great respect, when you are making your considerations, I suggest that you have to give some flexibility to the people ultimately responsible.

Mr. MacTavish: I think your point is a valid one that must be taken into consideration if any such thoughts or recommendations are made later on by this committee.

Mr. Bray: We have the principle enshrined in our legislation in connection with our discretion to take emergency action in the public interest. If our investigation staff come forward with evidence that a particular dealer or salesman is behaving in a fraudulent way, we are subject to the rules of natural justice. No man, in general terms, can lose his livelihood without having an opportunity to be heard, but we are empowered to take immediate action to suspend his registration without a hearing, provided we have a hearing within 15 days.

If we have a situation we think is bad enough to warrant immediate suspension, then we have the power to act and prevent further harm to the public by taking the dealer or salesman out of business. We are also forced to have a public hearing immediately following.

Mr. MacTavish: That is in your statute now.

Mr. Bray: Yes, in sections 123 and 124. Section 123 is the right to issue cease trading orders and section 124 is the right to deny the right to trade. Back in the earlier registration part, at the front, is section 26. This will illustrate section 26: "The commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest." The general rule is there must be a hearing.

Then it goes on to say: "Where the delay necessary for a hearing under subsection (1) would, in the opinion of the commission, be prejudicial to the public interest, the commission may suspend the registration without giving the registrant the opportunity to be heard, in which case it shall forthwith notify the registrant of the suspension and of a hearing and review to be held before the commission within 15 days of the date of suspension."

You might want to consider that kind of a principle; power to act and--

Mr. MacTavish: That leads me into my next question. Perhaps I should premise the question by saying we all know the personnel of boards and commissions of government change from year to year and time to time. Let us assume the securities commission's present practice, which I understand has been in effect for some years, might not be agreed with by some future commission and it might be inclined to discontinue it. Would there be any objection, in your mind, to carving in stone the principle of this practice in your legislation so it is there regardless of the views of a commission down the road?

Mr. Bray: You are probably looking at a broader question, which is whether there should be some legislation of more general application applying to regulation-making process under all acts, not just the Securities Act. Obviously my answer to your question would be that it is a practice we think is a good one and one which we ought properly to apply tor other acts as well.

10:50 a.m.

Mr. MacTavish: Thank you very much.

The Vice-Chairman: Are there any questions of the witness from committee members?

Ms. Bryden: I have a number of questions. I found Mr. Bray's explanation very enlightening. I think what the Ontario Securities Commission does is an example that could be considered for general application, but you have a very specialized field of operation. You are in a fast-moving marketplace and I can understand you would need some opportunity to act very quickly.

I gather you would not have any particular objection to enshrining in legislation the kind of notice and consent you have been doing as long as there was a safety valve. I notice also you have a very long list of subjects in your act on which you can issue regulations. There are 36 enumerated in your statute. The 36th is another safety valve. It allows you to exempt any person or company from the provisions of any regulations. I wondered if that has been used very much.

Mr. Bray: No, I do not think that one has been used at all.

Mr. MacTavish: Not to my knowledge.

Mr. Bray: That one has never been used. If a new exemption is thought to be needed--let us say some new tax benefit that only benefits a very limited section of the public and those people do not need the protection of the act--we would recommend a regulation. We would not exercise that power ourselves. We cannot act under that. They can pass a regulation which would grant the director of the commission the right to grant exemptions. Frankly, I cannot even dream of what we would ask for under that because, in all candour, the act gives me more power than I would sometimes like to have.

Ms. Bryden: Section 139 lists these 36 areas in which you can pass regulations.

Mr. Bray: In which the government can pass regulations; you are quite right.

Ms. Bryden: Yes. That exemption would appear to be another safety valve, but as far as you know, you have not used it very much or at all.

Mr. Bray: We have not found the need for it.

Ms. Bryden: As far as regulations affecting fees goes, it appears the procedure is that you do call for comment and then it goes to the Minister of Consumer and Commercial Relations. Presumably the Treasurer either does or does not put the increased fees in his budget.

Mr. Bray: I think the Management Board of Cabinet looks at it. The financial people look at it to see if it is in line with what has been done in other areas of government and then they recommend it to the cabinet committee. Then it becomes an order in council.

Ms. Bryden: Has the Treasurer or the government put a higher level of fees than what was proposed in your recommendation? I presume most of your comment is that they would like the fees lower or varied in some way.

Mr. Bray: I do not want you to infer anything. We have not had any direction on the subject at all. We took this action on our own initiative because it had been a long time since fees were reviewed and obviously inflation has taken a terrible toll and, secondly, in a time of general constraint and a general, but not specific, direction to recover all costs, we have not had that. We thought it was prudent management to consider it. Our fees certainly have to be adjusted in line with the inflation that has taken place. That is only fair.

That is the one we hope will go through subject to whatever change the government's financial people suggest. The other one, the user pay, is quite a different subject and is very controversial.

Ms. Bryden: The proposal that has gone forward is not a strict application of the user-pay principle?

Mr. Bray: Oh, no.

Ms. Bryden: It is simply an increase for inflationary effects over a number of years. Since I understand that the Treasurer does favour a user-pay principle in a lot of other fields, he may in his budget come up with a much higher level of fees than is proposed in your proposed regulation.

Mr. Bray: The user-fee concept--this is where the industry got a little excited--suggests a new form of what might even be considered a kind of a direct tax, a transaction charge on every brokerage or commodity transaction--what we call a ticket charge--which would really be a direct tax that would be paid by the beneficiary of the system, the investor for whom the system works.

We have set up a fairly sophisticated continuous disclosure system over the past decade. It operates at some cost, not only to the issuers who raise funds through the system, but also to the taxpayer through the staffing we must do to keep the system in place. The question raised is whether some of that cost ought to be recovered from the people who are benefitting from it, that is, the persons who are trading in shares or commodity contracts or options in all these funny little pieces of paper that we see flying around now. That is the user-pay concept.

The other side of that coin is that there is an argument too that we are, in part, a very specialized police arm, a specialized detective branch, and there is a question whether the cost of that enforcement program ought not to be picked up the way that the general costs of policing are by the taxpayers as a whole.

The larger thought is that the beneficiaries of the system are all the taxpayers because it enables money to be raised through the system--capital for business to help them expand, and hopefully to create jobs and all the good things that we all want. That is what the system is intended to do. Today it may not be working as well as it ought to, but that is another subject.

Ms. Bryden: The user-pay concept then is not easy to apply because of what costs should be charged to what operation.

Mr. Bray: To what segment, yes.

Ms. Bryden: That is an interesting point.

Mr. Bray: Is it a police function? Should the investor bear the cost? This is over and above the straight licensing fee or the cost of processing a prospectus which is built into the present act. There is a charge for a saleman's registration.

You file a prospectus with us and there is a charge for screening that prospectus. There is a cost to the legal and other analysts who look at a prospectus. We are trying to cover that in part now under the present act, but the broader concept is really the surveillance, the enforcement side, that makes this continuous disclosure system work.

Ms. Bryden: I have a point with regard to the notice that does go out in your weekly summary when you are going to do a regulation. I had noticed that the weekly summary was not coming to the MPPs and I am not complaining because we just do not have space to store it. I rely on the critic for the Ministry of Consumer and Commercial Relations to have a copy on file. My main problem was to remove the coloured page on the front in order to put the rest of it into the paper recycling bin which we are required to do, and they do not take anything but white paper.

Mr. Bray: That is a break-even operation, believe it or not. We charge enough for that that we actually make a dollar or two on the weekly summary.

Ms. Bryden: What is the circulation of the weekly summary?

Mr. Bray: About 2,000, largely professions. It circulates across the country. You might be interested in knowing it is even followed by the national commission of the Australian government. They watch very much what is happening in Ontario.

Ms. Bryden: I suppose practically all the comments come from the province of Ontario. Would you get comments from the Quebec Securities Commission?

11 a.m.

Mr. Bray: Oh, sure, probably because sometimes the things we are leading on they are interested in doing, and we are trying to evolve as much uniformity--or, at worst, compatibility--because most provinces are seeking to keep securities regulation as a provincial matter. If we do not make the system work provincially, then that is a clear invitation to our colleagues in Ottawa to get into business.

We had joint hearings--this is not regulation-making power--with the other commissions back last fall on the issue as to whether the Toronto Stock Exchange should be permitted to continue with its fixed minimum commission rate structure. We were joined by Alberta and British Columbia as participants. Quebec, because of a legal glitch, cannot sit legally outside of that province, but the Quebec chairman came down and sat with us as an observer. So there are some joint interests.

If there is anything that seems to affect the investor, the papers pick it up too--the financial pages, the Globe and Mail in particular, but to a lesser extent the Toronto Star, Financial Times, Financial Post, and believe it or not, the Wall Street Journal.

There is a Securities Regulation and Law Report that is published in Washington that is a complete coverage of the United States. They are subscribers to our bulletin and we will find what is happening in Ontario tucked away with what is happening in California and New York. We have noticed it at least.

Ms. Bryden: Can you say, on the average, about how many comments you would get on any given regulation? I suppose it depends on the subject.

Mr. Bray: On the average not too many. Keith, who has more to do with reviewing it, reminds me that on the average we will get perhaps 10 comments. We got a substantial number on the fees, particularly from some of the people whose licence fee was being upped--everybody thinks it is too much. On some of the more contentious issues we have had 50 to 100 comments.

Ms. Bryden: Do many of the people out there, the individuals or companies, ask for the opportunity to see the comments of the other persons commenting?

Mr. Bray: We have a policy on that and it is a publish policy. We say that unless they ask to have it kept private and we will do that because we think there is some virtue in doing so. They go into a public file. The comments and letters are always available to the public. The papers do look at them, and occasionally some of these little bon mots that you see in Jack Willoughby's column in the Globe and Mail have been extracted from the comments he has picked up from the public files. We are very open with it.

In our bulletin we list the firms, the individuals who have given us comments. We actually name them when we publish the summary. When the closing time comes we will note the closing and say we have received comments from the following. Of course, it follows from that that you can look at what they have to say in the public file. The interested parties--you might call them the lobbying groups--know where those files are. They certainly get to them and make their submissions based upon what they find in those public files.

Ms. Bryden: What is the average time that you give for comment?

Mr. Bray: Upwards of a couple of months.

Ms. Bryden: You say upwards. Sometimes is it less?

Mr. Bray: It depends if it is an urgent matter, but normally it is two months.

Ms. Bryden: I do not think most MPPs are getting the weekly summary. I wonder if you could furnish us later on with a copy of a notice for any sort of recent regulation that you have put out notice calling for comment?

Mr. Bray: I tell you what we will do. We will get you a copy of the one I was talking about on the fees that we published in December. Keith will supply enough copies for the committee.

Mr. MacTavish: If he will be kind enough to send them to the clerk of the committee, he will arrange to have copies sent to the members of the committee. That was going to be my next and final question. Would you be kind enough to arrange to have sent a copy of whatever notices appear in your house organ? That's a weekly?

Mr. Bray: Yes.

Mr. MacTavish: Also any notices that commonly appear in the local press.

Mr. Bray: We do not publish in the press normally. It is extraordinary.

Mr. MacTavish: Fine.

Mr. Bray: Occasionally on one of these public interest hearings, which is not what we are talking about now, we will tell the applicant to publish a notice. It does not cost the taxpayer anything; the applicant pays for that.

Mr. MacTavish: The committee is interested in regulation procedures

Mr. Bray: The only one we have had recently is the fees. We'll get you that one.

Mr. MacTavish: We would appreciate anything in the way of published notice of what the procedure is all about.

Mr. Bray: Sure. Mr. Boast will take care of that.

Mr. MacTavish: Thank you very much.

Ms. Bryden: You say occasionally you have public hearings on a regulation. What sort of notice is given when you do decide to have a public hearing? In fact, what are the criteria that would lead you to decide to have a public hearing?

Mr. Bray: If I led you to the impression that we normally have public hearings on regulations, I misled you abd I am misstating myself. We have really only had one period in which we had public hearings and that was on the regulations in the new act. It was a big, complex package and, actually, I do not recall what we did there. We used the big meeting room in the Macdonald Block by invitation and we had sessions there of upwards of 500 people explaining to them what we were up to. It was sort of a mutual education process.

By that time we had had many small meetings, with the legal fraternity, the accounting fraternity, the interest groups, investment dealers, Toronto Stock Exchange, but it was not a public hearing of the kind that you are perhaps thinking of, the confrontation type of public hearing. These were give-and-take meetings.

Finally, it wound up in September 1979. After we issued public notice and invited people to enrol to let us know they were coming, we had two separate sessions that then proved to be of so much interest to them that we had the sessions in the big room in Macdonald Block.

Ms. Bryden: Do you have a panel from the board for the public hearings?

Mr. Bray: In that case we had all the senior staff members. There are two permanent commissioners, the chairman and myself, and we were both there. At that time it was Mr. Baillie and myself. We were there throughout the session, participating in the give and take. The heads of our various specialized sections include the corporate finance section, which deals with the prospectuses and the other financial vehicles, and the licensing section, and so on. Corporate finance and continuous disclosure were the two major changes. When the new takeover bid rules were under discussion, it was in those sessions as well.

That had been a sort of seven- or eight-year process because it had been through the justice policy committee. There had been public debate on the legislation in the justice policy committee and the regulations and there had been lots of public discussion on that one.

Mr. Boast: The session that the vice-chairman describes, where there was attendance in the range of 500 and so on, was very much an educative process. The regulations had been completed and had been, while not enforced, ready to go. So it may not have been within the kind of context you are thinking of.

11:10 a.m.

We had a public hearing within the last half-year on proposed regulations. We gave notice--I think it was certainly in the range of something like six weeks--that we were going to hold this public hearing to discuss the proposed regulations. Prior to notice of that hearing, we had published the regulations in their proposed state and had received comments. The attendance at that particular meeting was disappointing. It was very limited, but there had been the kind of notice that should have been given.

I think people felt the process of notice and written comment was sufficient for their purposes. I do not know what our practice will be in the future. It will turn on each particular instance, I am sure, as to whether there is any merit seen in having a public hearing.

Ms. Bryden: What was the subject matter of that particular hearing?

Mr. Boast: As I say, it was a fairly extensive package of proposed amendments to the regulations under the Securities Act. A good deal of the package was housekeeping but some of it was of important substance.

Mr. Bray: Was that the one at which the summary prospectus or statement was discussed?

Mr. Boast: No, that would have preceded this one. This was the one that would have incorporated the resale restrictions and that sort of thing.

Mr. Bray: This is a tightening up--

Mr. Boast: I am sorry, Harry, I am mistaken. That was proposed amendments to the act. All along I have been saying it was proposed amendments to the regulations and it was in fact proposed amendments to the act. As I say, there had been notice and comment given on these proposed amendments and a public hearing held, but the nature of the attendance was disappointing to me.

I might just comment that has often been a personal disappointment to me. We have been, I think, very good about this notice and comment process, but we have never got quite the response I would have liked to have seen or would have expected perhaps in innocence.

Ms. Bryden: At the big meeting you had, which you say was largely of an educational nature on the proposed new regulations, did people have to register in advance in order to be allowed to speak or could anybody who showed up at that meeting speak if he wished to?

Mr. Boast: As I recall, there certainly was an opportunity for them to speak. I think there was such a press for the places that there may have been a requirement to register in advance to be able to attend and have a place to sit. I really cannot recall, but there was an opportunity for general discussion. I suppose it was something of a seminar. Things were presented to them in some fashion that was hopefully understandable, and then they had a chance to enter into a dialogue with the people who were making the presentation.

Mr. Bray: The regulations tend to be fairly technical, so the general public interest themselves very little. I doubt for the most part they understand the implications of what we are trying to get at. But where there is, let us say, a takeover bid where there are a lot of public shareholders, and one party or another has requested a hearing, we publish notice of hearing.

At those public hearings we always ask who is present and who would like to be heard. It is inevitably our practice to ask if they want to be heard. If a public shareholder turns up or a member of the public shows up and wants to have something to say, they are heard. That is our practice and there is no question about it. Now we are talking about a different kind of hearing, but there would be no reason in the world why, at any hearing, we would not let people speak.

The commission rate hearings in 1976 was the last time we had a substantial number of members of the public come up. That got a lot of publicity and we had quite a number of individual investors come up and comment on the fixed rate of commission the Toronto Stock Exchange was then charging.

I do not think we had one individual investor show up at the last hearing, although we gave it as widespread publicity. I share with Keith the disappointment that we do not hear much from our constituency. It is that silent majority who are out there and who do not show up. We view our role as looking after them as best we can, but we do not hear from them as often as we would like.

At the 1976 hearing many investors showed up. There were some individuals who said, "We were paying too much," or "Make sure we don't." It was the sort of comment you might expect. Not a soul showed up at the last one. It was all interested parties, institutions that think perhaps they are paying too much, and so on.

Mr. MacTavish: If I may intervene just to clear up Ms. Bryden's point. I take it your process of notice is adequate to inform anyone and everyone who is interested in the subject to attend. Furthermore, they may attend without any red tape. They may attend and participate in the action, if I may use that term. Am I right on that?

Mr. Bray: Absolutely. Even though it is a technical right, we try to put the statement of purpose in layman's language. Some of the language tends to be pretty stilted and technical, and we try to put some explanation in to try to give the person reading it, who is not an expert or a lawyer or an accountant, some idea of what we are trying to do. Sometimes it really does not make much sense unless you have got the whole mosaic of the regulations in your head and you know what you are really doing by making changes.

Mr. MacTavish: That is an understatement, I think.

Mr. Bray: It may well be.

Ms. Bryden: I have just one final question. In roughly how many instances do you make changes in the regulations as a result of this process of notice and comment?

Mr. Bray: I would say dozens. Mr. Boast is involved more in the drafting these days than I am and he has just whispered to me that inevitably we make changes.

Ms. Bryden: Substantive ones?

Mr. Bray: More often clarification than substance. Occasionally though we will change direction. It will just be made apparent that what we are doing is impossible. I can think of that happening more often in our policy statement process which is very similar to the process I have described. We will come down with a statement and somebody will say, "That is not going to work," and because we have not had a wide enough sampling initially we say, "By golly, you are right; that just does not work."

Ms. Bryden: Can you give us an example of a change in direction?

Mr. Bray: In policies? Last summer we published notice that we were having a hearing on what was described as the uncommon equity problem. That is the practice of people having control of companies and selling shares which have no votes. You have full participation in everything except votes which is not exactly democratic in a lot of people's minds. To get a label on it, we call it uncommon equity.

We took immediate action and said there would be no more of these issues qualified. We said to the exchange, "We would be much obliged if you did not list any more of these for the time being." Mr. Boast, would you like to tell Ms. Bryden the shift? You can describe it better than I.

Mr. Boast: Yes. The shift was along these lines. Initially when we went into the area, we wanted to introduce some kind of machinery in the takeover area, to protect these people in the event of a takeover. Normally, as we stand now, they would not share, that is, the holders of these non-voting securities would not share in any premium that might be paid for the voting securities. Many of them perhaps in the past had bought those securities thinking that, since they were common securities, they had rightly some kind of participation in any takeover.

We certainly gave out signals that we thought we would be introducing relatively extensive machinery to not only disabuse them of that notion, but introduce substantive protective devices to have the desired result. During the course of the hearings--and I think the hearings went on for two or two and a half days--it started to come out, and it certainly jelled in the commission's mind, the tribunal's mind, that that was not necessary, that what would do the job was disclosure--that disclosure of what these shares were at every opportunity to the potential purchasers and holders would be enough to protect them in these takeover situations, or at least make them understand they were not going to share in any premium.

11:20 a.m.

The resulting policy did not incorporate any of this machinery which we at first thought we might be putting in there; it would have caused a great deal of alarm and probably would have been something in the nature of overengineering and too extensive. In the minds of a lot of people that was a 180-degree turn or qualification on the nature of the policy and the resulting policy was one that is, I guess, exclusively disclosure instead of this other machinery I speak about.

Mr. Bray: The reason I let Keith speak is that I did not sit on those hearings; I have forgotten why. I read all the material but I did not sit.

The reason for the shift is the Toronto Stock Exchange was urging us very strongly to incorporate some sort of a requirement that anyone making a takeover bid would also have to pick up these "uncommon equity" shares.

This is another situation where there is a kind of national interest to take into account. The Montreal Stock Exchange, the Vancouver Stock Exchange and the Alberta Stock Exchange were all interested. So you have to be conscious of the fact that not only is Toronto the premier financial centre in Canada, and I make no apologies for that, but we hope to stay that way and we must remain competitive. There is no use closing your eyes to the fact that if you impose certain things you are shifting business elsewhere in Canada, and that is not the objective of the Ontario Securities Commission.

So sometimes you do not go as far as you would like to go, but a very good example of why we are in the forefront by ourselves is the follow-up bid requirements. There is nowhere else in Canada where they are doing that.

The Vice-Chairman: Do any other members wish to question Mr. Bray?

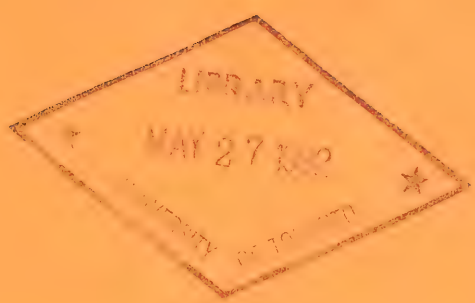
Thank you very much, Mr. Bray and Mr. Boast, for appearing before us this morning.

Next week we have Mr. Paul Hess, the director of legal services of the Ministry of Labour, to appear before us regarding notice and comment on the Occupational Health and Safety Act. That is next Thursday.

Two weeks from today Mr. David Mundell, from the Ontario Law Reform Commission, will be appearing before us.

If there is no other business to come before the meeting, I declare the meeting adjourned.

The committee adjourned at 11:22 a.m.



STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

NOTICE AND COMMENT
OCCUPATIONAL HEALTH AND SAFETY ACT

THURSDAY, MAY 13, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

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VICE-CHAIRMAN: Barlow, W. W. (Cambridge PC)
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Jones, T. (Mississauga North PC)
Kerrio, V. G. (Niagara Falls L)
McEwen, J. E. (Frontenac-Addington L)
Runciman, R. W. (Leeds PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

From the Ministry of Labour:
Hess, P., Director, Legal Services

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Thursday, May 13, 1982

The committee met at 10:12 a.m. in committee room 1.

NOTICE AND COMMENT
OCCUPATIONAL HEALTH AND SAFETY ACT

Mr. Chairman: It appears we have a quorum. Today we have with us Paul Hess, who is director of legal services for the Ministry of Labour. We are pleased to have you here this morning, Mr. Hess.

Mr. Hess: Thank you very much, Mr. Chairman.

Mr. Chairman: He has come to talk to us about notice and comment procedures regarding the Occupational Health and Safety Act. The act does have some notice and comment procedures which, I am sure, committee members are aware of. This is an area the committee is very interested in, Mr. Hess. We have had several witnesses appear and there will be several more after you as we try to wrestle with the problem of what to do with notice and comment.

We are very interested in the fact that this particular act has had notice and comment. There will undoubtedly be plenty of questions from committee members as to how it has operated in practice and what your experience with it has been. If you have some introductory remarks, we would be pleased to hear them.

Mr. Hess: Yes. Mr. Chairman, I have prepared a memorandum about section 22 of the Occupational Health and Safety Act. I have some extra copies.

Mr. Chairman: The clerk will be happy to distribute those for you.

Mr. Hess: I will not read this memorandum to the honourable members. I will just simply comment on it as I go along, if you can follow it with me. I set out the section and I call your attention to the fact that it requires two instances of publication. It starts out by saying, "Prior to a substance being designated under paragraph 14 of subsection 2 of section 41, the minister shall publish in the Ontario Gazette a notice" that the substance is going to be designated and asking for briefs and submissions. Then it goes on to say "shall publish in the Ontario Gazette a notice setting forth the proposed regulation relating to the designation of the substance at least 60 days before the regulation is filed..."

If one reads that rather carefully, there are the two requirements for publication. First of all, you are going to designate a substance. It is your intention to prohibit, regulate, restrict, limit or control the exposure of a worker to a particular substance. You ask for briefs about that portion of it.

The next notice simply requires the ministry, after getting the briefs and submissions, to come up with a regulation it proposes to introduce, to publish it and then file it within 60 days. The section can properly be said to provide for antecedent publicity. The comments invited are only on the intention to designate the substance. There is no provision, as I read this section, for comment on the actual regulatory provisions as to in what manner and to what extent you are prohibiting, limiting or controlling the exposure.

Some other problems have also arisen from this section. Having received the briefs and submissions, suppose you then want to change the regulation you had published in the 60-day period. Does that mean you have to go back and republish it with changes, or should that only be done with substantial changes, and what are substantial changes? If you keep changing it, you never would be able to file a regulation, if that is a proper reading of the section.

Another problem is this: Suppose you have gone through these statutory conditions and steps, and you find a mistake has been made or there is something wrong through experience in its application and administration, you would want to amend it or revoke it but this section does not provide for that.

Conceivably, one could publish a notice of intention to designate, ask for comments and briefs, publish a draft regulation, file it and then it is wide open as to what you can do thereafter. You can do anything so far as that substance is concerned, in so far as regulating it, prohibiting it, or whatever.

The ministry encountered these sort of problems early on. It has published notice of intention to designate a total of eight substances. This was done way back in June 1980. It asked for briefs and submissions with simple notice of intention listing substances such as silica, asbestos, isocyanates, coke oven emissions, noise, and so forth.

In response to that initial publication, we received about 40 briefs. As I comment in my memorandum, the briefs said the comments would not really be of any significance unless they knew, first of all, the reasons why the ministry arrived at the conclusion that a specific substance was considered likely to endanger the health or safety of workers and also the manner in which it proposed to actually regulate, restrict and control exposure to it.

Because of that, the ministry then took another look at the matter and about two months later developed draft regulations. It gazetted the specific standards which would be used in respect of each of these substances. In response to those, we received 10 times as many briefs, over 400.

To show we were not just going through the motions within the ministry as the statute required, we then prepared what we called interim reports. These, in effect, were the justification for the ministry designating the way it was going to deal with exposure to those substances. Those were made available to any interested persons. They were placed in the ministry library and in all the ministry offices throughout Ontario.

At the same time, the ministry analyzed all the briefs and submissions in relation to their comments on each section of the proposed regulations, considered them and in quite a number of cases revised and amended the draft regulations. It then called a public meeting in respect of each of the substances inviting those interested to attend, particularly giving invitations to those who had submitted briefs and comments. That was carried out.

At the public meeting there was a slide presentation for the first half of the afternoon, followed by questions and answers. The purpose of it was to show how the ministry was going to deal with the regulations, in the light of the comments and briefs, and its reasons for either adopting or making changes or not making changes.

10:20 a.m.

The ministry also has another mechanism that it has arranged. Following all this, it also now submits to the Advisory Council on Occupational Health and Occupational Safety its final report on the substance to be designated, together with its final version of the draft regulation and any codes with respect to measuring air sampling, medical surveillance, respiratory equipment and so forth. The advisory council is established under the Occupational Health and Safety Act by section 10.

Then I summarized the various steps taken. In other words, on page 6 of the memorandum, I set out the various steps. These are matters that the ministry, in practice, is now using with reference to the designated substances.

As to public comment on regulations generally, I think one would have to say that in the instance of designated substances one has specific interest groups that one is dealing with. So one will therefore, through advance publicity and the request for comment and briefs, have some very well thought-out questions on how the matter should be dealt with.

I can see that where one has a general regulation or general application, there are no special interest groups involved. Therefore, the comments one would receive in that respect would perhaps not be very practical. If one would receive any at all, they would not be a great deal of help.

What I am trying to say is that in a designated substance case we know the people who would be interested in certain substances on the side of industry and on the side of labour. You can get them; they are interested, they both know and are aware of any problems there are. You are then able to really work effectively under this matter of publication and comment.

Mr. Chairman: Do you feel in your own particular circumstance, as I gather from your comments, that the system has worked very well, the one you have in place with respect to this particular section?

Mr. Hess: Yes. In the way we have had to adapt the section and adopt a policy in relation to it, it has worked quite well.

Mr. Chairman: Thank you. Do any committee members have questions for Mr. Hess?

Mr. Kerrio: Yes. I have some concerns that relate to some of the concerns you might have in presenting this to us. In section 22, while the notice stating that the substance may be designated would then have those interested enough to present briefs or submissions, there would be very little participation in the proposed regulation of the same area of concern.

In all probability, the reason you are satisfied with what has happened is that it has not presented a problem. But it could very well present a problem to someone who is genuinely interested in not only having the substance designated, but participating in the regulation.

Mr. Hess: Yes, of course.

Mr. Kerrio: I would have to think that if someone were interested enough in participating and discussing the designating of a particular substance, it would follow he would have the expertise or have been exposed to the expertise to allow him to make some comments as to how the regulations should then be drafted. In fact, it may very well be worth while thinking about some change to the act to allow that to happen.

Mr. Hess: Yes, it has been of some concern to the ministry. Section 22 came into the act--just to provide you with background--by way of an amendment that was moved before the standing committee on resources development to which Bill 70, as we then called it, was referred.

I think it is fair for me to say that this section, as it now appears in the act, has not been given any really deliberate study. It came in on a motion to amend and I do not think it was debated very long. There was very little comment on it; it just went in.

Mr. Kerrio: I can think in terms of a substance being designated and the manufacturer, at the outset, being able to put forth concerns as to the use of its product. But subsequent to that, the use of it in the work place might take on an entirely different character. It might be even more dangerous than the substance in itself would present as a danger.

Mr. Hess: Oh, that is true.

Mr. Kerrio: The regulations would then have to be drafted by people who might have experience or expertise in the end use.

Mr. Hess: If the substance comes in proximity to heat, cold or some other element, what they call the synergistic effect might be ten-fold.

Mr. Kerrio: Ammonium nitrate is pretty inert until you mix it with oil.

Mr. Hess: Yes, it has a very strong potential.

Mr. Kerrio: Yes.

Ms. Bryden: Mr. Chairman, I, too, feel that there is probably some need for legislative tightening up, although it appears that administratively you have been following the procedures that probably would be desirable to put in the legislation. The processes seem quite good, but certainly the fact that there is nothing in the legislation calling for comment on the draft regulations is a defect that perhaps we might consider drawing to the attention of the government in our report.

Also, the actual notice in the Ontario Gazette only, under the statute, is probably inadequate. I understand that you do not limit yourself to that notice, that you do put ads in the newspapers regarding both designation and the draft regulations.

Mr. Hess: Yes. We know, for example, the people who are using certain substances in their work processes and they are notified. So are the unions and the industry. We do get comments in advance. Of the eight substances we designated, there was no attempt by anyone to say they should not be considered in that class, that the exposure should be regulated or controlled.

Ms. Bryden: Do you send letters to whom you think are the interested employers and unions using those substances?

Mr. Hess: Oh, yes, and we invite them to comment on what they think.

Ms. Bryden: Did you also use newspaper ads for both the procedures outlined in clauses 22(a) and 22(b)?

Mr. Hess: No, we did not use newspaper ads as I recall.

Ms. Bryden: Not even on designation? I thought I had seen some perhaps calling for a public meeting.

Mr. Hess: That may have been a notice that the regulation would be filed on such a date so that all employers would have notice of its actual filing.

When we file a regulation under the Regulations Act, no one really knows about it until he happens to pick up a copy of the Ontario Gazette. If one looks at the Gazette, there it is.

Ms. Bryden: How did you advertise the public meeting you mentioned?

Mr. Hess: We did not advertise them in the newspapers, but we wrote to everyone who had sent in comments and submitted briefs. When I said a public meeting, I do not want to mislead the members of the committee. We did not invite everybody, although they could have appeared if they had heard about it and saw fit to do so. We did not advertise those meetings in the newspapers.

10:30 a.m.

Ms. Bryden: Do you notify the central bodies of both the employers and trade unions?

Mr. Hess: Oh, yes, the Ontario Federation of Labour and the Canadian Manufacturers' Association and the various associated groups. By arrangement they had agreed to circulate their locals on the others as well.

Ms. Bryden: I think that would be the best way to get the word around. They have their own publications.

Mr. Hess: That is what we did.

Ms. Bryden: I guess some of the ads I have seen were federal ads because they also do pre-publication on hazardous substances. You have not been using newspapers as far as you can recall?

Mr. Hess: No.

Ms. Bryden: Do you think the interest is quite wide on some of these substances, such as asbestos and mercury? Would not a newspaper ad of the public meeting be useful?

Mr. Hess: We have a royal commission on asbestos that has been sitting for some considerable time. I do not know at what stage it is now, but it has been holding public hearings for a long time. The problem is, are you going to get enlightenment or heat in the form of light or what? I am not sure how far you would extend public invitations to members of the public to come forward, although they would have that right anyway. You were thinking about giving them an opportunity, but I do not know.

Mr. MacTavish: Mr. Hess, just to follow up Ms. Bryden's point, following one of these eight designations of substances, have you had any squawks from anybody or any group of people that they did not know about it? They wanted to appear but did not have an opportunity because they were not aware of what was going on?

Mr. Hess: No, not to my recollection.

Mr. MacTavish: So the notice in the Gazette, your letters and, I suppose, telephone calls as well to the groups you are aware of, are quite adequate?

Mr. Hess: Oh, yes. Some of the substances are very narrowly used by certain manufacturers only, but on some of them I think we had 400 representatives at the meetings. That is a fair number of people to come to a meeting on a regulation. The Ontario room over at the Macdonald Block was full, and that is a large room. I am not just talking about one half of it. It was the whole room.

Mr. MacTavish: Do you get any input from, let us say, the industry concerned in one of these designations? Do you get any input from them before the notices go out under section 22 of the act? In other words, do they know what is going on? Do they know the score? Do they know the thinking of the ministry before the machinery starts?

Mr. Hess: Yes, but it is not only industry, it is also labour. I agree with you except that I add labour as well.

Mr. MacTavish: All the parties concerned?

Mr. Hess: Industry and labour are our main client groups in that regard.

Mr. MacTavish: So they often come in on occasion and help out in the very early stages of preparing a regulation?

Mr. Hess: Yes. I have attended many meetings at which industry has attended and which representatives of trade unions have attended.

Ms. Bryden: I still have some further questions. Are all these public meetings held in Toronto and in the daytime?

Mr. Hess: Yes, they have been, as I recall.

Ms. Bryden: So workers would have to get time off, hopefully paid for by their union, in order to attend?

Mr. Hess: Yes, that would be true if they wished to leave to attend.

Ms. Bryden: Have there been any requests to hold them outside of Toronto? Have there been any industries where most of the industry affected was located outside Toronto?

Mr. Hess: Yes, there have been. I am thinking, for example, of the chemical industry in Sarnia.

Ms. Bryden: But you still held the hearing in Toronto?

Mr. Hess: Yes, we did.

Ms. Bryden: Do you think holding them closer to the industry is something that should be considered as far as the location for the meetings?

Mr. Hess: Perhaps I better describe the meeting itself and then you will see whether it is advantageous to hold it outside Toronto. At the meetings which I have attended discussing these designated substances, there have been approximately 25 people from the Ministry of Labour located here in the main office, running from the deputy minister right down to the technical staff of the studies and programs branches, including hygienists, engineers, doctors and specialists.

The question is: Do we take all those people with all their bulky materials we have to haul around with us? We are there to answer questions and we need a lot of backup material. Do we haul all that with us, or is it easier to ask them to come where we have all this and where we have the equipment which we can set up? We use the slide presentation method. There are three screens and three projectors so you can just run your eyes across and see the original proposal, comments and objections and then what we propose to do about it in relation to them.

I think logistically, and from a practical point of view, we came to the conclusion that if we were going to use that formal presentation, we would have to really confine ourselves to Toronto. If we are just simply going to meet and talk about it and have a few people there, then there would not be much of a problem involved.

Ms. Bryden: I can see your logistical problems. On the other hand, it is a long way from northern Ontario to Toronto, particularly for working people. There may be a case where you were dealing with chemicals used in the pulp and paper industry which is largely in northern Ontario. Have you had a substance that is mainly used in the pulp and paper industry?

Mr. Hess: Not as yet, as I recall. Let us face it, I suppose some of the substances are there. They are not being used in the sense that they are being actually part of the process. They would be present in the air obviously because of equipment or other things there, but not as a vital part of the process.

Ms. Bryden: If it mainly affected workers and companies in northern Ontario, do you not think it might be advisable to consider having a public meeting in Sudbury or Thunder Bay?

Mr. Hess: I would think that would probably be so. Mind you, the steelworkers in Sudbury, for example, have offices here in Toronto. I think the steelworkers or representatives of steel have attended every meeting we have ever held on designated substances. To my recollection they have attended every one, and not just one person, but several of the steelworkers, including their research specialists too.

Ms. Bryden: Yes. I know they have a very active occupational health and safety research department. Have there been significant changes made in the regulations as a result of these public meetings?

Mr. Hess: Yes, there have.

Ms. Bryden: For most of the substances involved?

Mr. Hess: Yes.

10:40 a.m.

Ms. Bryden: Has the advisory council made any significant changes since it receives the regulation before it is finally passed?

Mr. Hess: The advisory council's functions, as I understand it, are to see that the consultative process has been adhered to and that someone who wished to had a fair opportunity of presenting views. That is their primary function.

It has become somewhat politicized, I suppose it is fair to say, in addressing itself to actual standards and raising matters in that regard, but not to a great extent. It does take a very thorough and good look at what is going on, particularly the ministry's justification in its review documents that support the proposed final draft of the regulation.

Ms. Bryden: Would you say that the advisory council has actually made suggestions that have been adopted in the final regulation that were different from the original draft that came to them?

Mr. Hess: It has made suggestions which have been considered and reviewed and then there have been discussions about it back and forth. I guess it is fair to say that there have been some adjustments made in a regulation in that regard.

Ms. Bryden: Can you recall any specific instance of a significant change?

Mr. Hess: Not offhand, no, but that is not to say there has not been because I am not that knowledgeable; anything of that nature would not go through the legal branch.

Ms. Bryden: With regard to the interim report you mentioned as another earlier stage in the process where the ministry tells people why the substance should be designated and also the method that would be followed in the regulations, this is sort of a pre-document preceding the draft, I gather. Is that correct?

Mr. Hess: In some cases, and in some cases they go along together, side by side.

Ms. Bryden: I would like to ask what sort of circulation it has. You mentioned that it was available in the library. What other circulation is there for it?

Mr. Hess: We place it in every ministry office throughout Ontario to my knowledge.

Ms. Bryden: Is it sent to the central bodies of labour and employers?

Mr. Hess: That I cannot answer.

Ms. Bryden: It seems to me it is a pretty important document for people who wish to make comments when the draft regulation does come out. If it is sent with the draft regulations, people would get it; if it goes out ahead of time they might not.

Mr. Hess: I do not know that we have adopted the policy of sending that out to everyone who we think is concerned with the regulation. It is a fair-sized volume.

Ms. Bryden: Do they receive notice that it exists and perhaps could apply for it?

Mr. Hess: I am sorry, you are into a field in which I am not knowledgeable.

Ms. Bryden: Perhaps that is something, Mr. Chairman, that we should look into and perhaps have a sample copy of one of the interim reports--whether the public is notified that they can obtain copies and, if so, how.

Mr. Chairman: We can contact the ministry in that regard.

Ms. Bryden: That would be useful, I think.

Mr. MacTavish: Probably Mr. Hess could arrange to have a copy sent to the clerk of the committee.

Mr. Hess: Yes.

Ms. Bryden: I just have one final question and you may not be able to answer this one either. What sort of relationship do you maintain with the federal occupational health people who are dealing with the same substances under the Hazardous Substances Act and maybe are going in for pre-publication of their own regulations in this field?

Mr. Hess: I beg to be excused from answering that question because you would have to address that to some of the technical people in the ministry who, I know, sit on various committees and things of that nature with their federal counterparts. I do not know the answer to that. You are getting into technical areas that I am not familiar with.

Ms. Bryden: I would like to ask Mr. MacTavish if he thinks it is relevant that we should know what the federal government does, not in great detail but in the field of hazard substances, and whether our regulation process is affected by what the federal government does regarding notice and comment on their regulations.

Mr. MacTavish: If the committee thinks it is relevant it is relevant. That's the short answer. Perhaps Mr. Hess can speak with some authority on the subject, I do not know.

Mr. Hess: Let us look at the jurisdictional matter first.

Mr. MacTavish: Very well, please do.

Mr. Hess: I think one has to approach and see what the federal people are into and what we are into. The federal government has introduced a Canada Labour Code, of course. Is it part 3 or 4? I always get mixed up with the parts that deal with employee health and safety. Their health and safety matters are concerned with matters of interprovincial transport, radio, television, banking, shipping, navigation; that, generally speaking, is what one usually encounters.

Mr. Kerrio: Uranium mines.

Mr. Hess: Yes, uranium mines. They, of course, have adopted the Ontario law in that regard.

Mr. Kerrio: There has been some real conflict there.

Mr. Hess: Yes. Then if you are talking about radioactivity, it is the Atomic Energy Control Board.

Mr. Kerrio: Are you thinking about the overlapping of jurisdictions we are having with the Ontario labour code and the federal labour code? The overlapping takes place because uranium is under the federal code and they are not quite sure who is going to enforce some of those regulations that we would be talking about as being designated and harmful.

Mr. Hess: A short answer is unacceptable to some people and they are raising the problem, but the short answer is that the federal government has the jurisdiction and authority to enforce whatever laws it has made applicable in that situation and it has not adopted any of the designated substance regulations. There are only two at the moment that have been filed, lead and mercury.

They have not adopted that. All they have adopted is the Ontario act and the mining plant regulations and made it part of federal law, applicable to uranium mines. It is enforced by federal officers who happen to be wearing two hats at the moment, one as mining inspectors of Ontario and the other as federal safety officers. When they go into a uranium mine they are really federal safety officers.

Whether there is any dichotomy between the two as to the regulation of substances--at the moment I do not know where there is any conflict.

Ms. Bryden: Do you know if the Ministry of Labour here makes comment when the federal government calls for comment under its notice and comment rules?

Mr. Hess: I cannot answer that question.

Ms. Bryden: Of course, we might invite them to make comment on our regulations, I suppose, if we thought it would be useful. I don't know whether they do. You do not know if they have sent in comments?

Mr. Hess: I am sure they have. As a matter of fact, I have seen some of them, but just how the mechanics of the system work I do not know. I know that in some areas, radio frequencies and things of that nature, there have been exchanges.

Ms. Bryden: Perhaps we should at least make sure that the relevant federal departments or officials are notified when we do go in for notice and comment procedures.

10:50 a.m.

Mr. Gordon: In talking about regulations, I am glad to see that that the Ministry of Labour is here.

I do not know whether this is appropriate to our discussion, but when we talk about occupational health and safety, I think that anyone in the province who works with chemicals in any particular process--to make or change something--should be required to receive a fact sheet each year or every six months.

This sheet would indicate what the chemicals are, what their potential side effects are and any occupational health problems that could be created by excessive exposure to these substances. I do not know whether we have that at present within the Occupational Health and Safety Act, but I firmly believe that a man in a work place has that right. It is his basic right as a human being to know exactly what he is working with or what is around him.

Mr. Hess: There is a section in the act--I did not bring it with me, unfortunately; I thought about it while I was coming up here to the building and had forgotten to put it in my folder--which says that every worker is to be advised of the health and safety aspects of anything in the work place. He is to be given instruction and training with regard to that.

Mr. Gordon: I am certain that is in the act, but I sometimes wonder how these things are practised. For example, we had more than one incident in Sudbury in the nickel refinery where workers have been exposed to nickel carbonyl. I know that they do receive a card that says, "The symptoms of exposure to nickel carbonyl are such and such," and that they are tested within certain time frames or parameters.

I just do not believe that we can do too much to make sure that people are working in the best possible circumstances, or at least are fully aware of the long-term effects and so on. That is not to say--many times workers are in areas where the chemicals are in minute quantities and are not, either in the long or short run, going to create a particular problem.

Then there are people who become sensitized to certain chemicals. There are some people who have hay fever, for example. I am that type of person; with certain types of pollen I get hay fever. Another person sitting across from me wouldn't be bothered by it at all. I think that these are the kinds of things that people should be made aware of.

In saying this, I am not suggesting that employers are not good people or that they do not try to do everything they can, but I think that we have an obligation to make sure in this particular field that we are doing everything possible. We know that the world that we are working in today is one which is filled with chemicals and we have an obligation to make sure our regulations and acts reflect that in a reasonable and meaningful way. That is my only comment at this time.

Mr. Chairman: Are there any other questions by the committee members for Mr. Hess?

Thank you very much for coming this morning, Mr. Hess. We have all, I am sure, learned something and gained some insight into the operation of notice and comment with respect to this particular section of the Occupational Health and Safety Act. Thank you very much.

Mr. MacTavish has indicated to me that Mr. Revell, who is a legislative counsel with the province, has prepared a paper for a degree he is doing at the University of Toronto about the history of regulatory action and reform throughout the province since its inception. It has been suggested that we file this as an exhibit with the committee, which I think is a very good idea. Every committee member will be provided with a copy of that.

I believe Mr. Mundell will be available next week. You will recall we tried to get him the first week, but he was in hospital at that time. He will be available as a witness. If there is any change in that situation, we will be notified prior to the meeting. Is that is suitable and agreeable to committee members?

Agreed to.

Mr. Chairman: We are adjourned till next Thursday.

The committee adjourned at 10:53 a.m.

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

NOTICE AND COMMENT

THURSDAY, MAY 27, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

CHAIRMAN: Eves, E. L. (Parry Sound PC)
VICE-CHAIRMAN: Barlow, W. W. (Cambridge PC)
Bryden, M. H. (Beaches-Woodbine NDP)
Di Santo, O. (Downsview NDP)
Gordon, J. K. (Sudbury PC)
Hennessy, M. (Fort William PC)
Hodgson, W. (York North PC)
Jones, T. (Mississauga North PC)
Kerrio, V. G. (Niagara Falls L)
McEwen, J. E. (Frontenac-Addington L)
Runciman, R. W. (Leeds PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

From the Ministry of the Attorney General:
Revell, D. L., Legislative Counsel

Witness:
Mullan, D., Professor, Faculty of Law, Queen's University

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTUMENTS

Thursday, May 27, 1982

The committee met at 10:19 a.m. in committee room 1.

NOTICE AND COMMENT

Mr. Chairman: I see we have a quorum now. I would like to get started and apologize for the late start to the two witnesses attending before the committee this morning. We have Donald Revell, of the legislative counsels' office, who has prepared the paper, "Rule-Making in Ontario" which we discussed briefly a couple of weeks ago. We will ask Mr. Revell to come forward in a minute.

We also have Professor David Mullan, from the faculty of law of Queen's University. He has written a few papers on this subject and I am sure the members will be interested in hearing Professor Mullan's comments to start with. Then we will undoubtedly have many questions. We have decided to tackle this topic of notice and comment, Professor Mullan, and hopefully come to some educated decision as to what should be done in Ontario.

Mr. Revell: Mr. Chairman, I hope I am going to be very brief. I know you are here to listen to Professor Mullan who has travelled down from Kingston. If you need me again, I am up on the third floor and can come back down.

The reason I am here is to submit my paper, "Rule-Making in Ontario" to this committee is in the hope it will be of some use to the committee with respect to its present undertaking in reviewing notice and comment procedures.

Second, the paper may be of assistance particularly to members of the committee in the future, when they come to the committee as new members. The paper deals at great length with the procedures now in place in Ontario for the making of regulations.

I understand Mr. Stone from our office was down several weeks ago and discussed that with the present committee, so it is going to be familiar territory for many members.

I might just outline the history of the paper. It is set out in the forward. The paper was originally prepared for Professor John Evans at Osgoode Hall and as part of a course I am taking for my LL.M. in public law. This is such a fast-moving area that within weeks of my submitting it to Professor Evans some significant changes had already occurred.

At the time I was writing the paper, the committee was only proposing to review notice and comment procedures. Of course, you are now into that undertaking.

Second, two weeks ago, Mr. Hess from the Ministry of Labour was here talking about the Occupational Health and Safety Act. Bill

110 has now been introduced and it amends section 22 which is the notice and comment procedures. So the paper has been updated to deal with these matters.

The paper is current to May 14. I must point out at the outset that this paper deals only with regulations; regulations as defined in the Regulations Act. That is what our office, the registrar of regulations office, deals with.

Professor Mullan may speak more about informal rules and guidelines published by administrative agencies or under which administrative agencies operate. These informal guidelines are not rules to which the Regulations Act applies for the most part.

The paper is divided into six parts, but the parts of most interest to the members would be parts 2 to 5, Statutory Framework for Rule-Making, under which I review the Regulations Act, the Interpretation Act and some other general regulation-making powers. The paper deals for about a page and a half with the regulations revision, which is a major project the province undertakes every 10 years to consolidate all of the regulations of Ontario into one set of books.

I then deal, in general terms, with the procedures for the making of regulations in Ontario. It would be impossible, in one paper, to deal with the procedures used by each ministry. What I have done, starting on page 12, is to deal with the general procedures as I have observed them. They may vary from ministry to ministry in some aspects and yet I think there is a common thread running through all of them. There is a rule-making procedure followed by all of the ministries and the procedures work, in my opinion, very well.

The office of the registrar of regulations and the functions of that office are dealt with at length in part 4. Under part 5 I deal with the review of regulations. Subheadings 2 to 4 deal with what we would call ex post facto review; that is, after the fact review. I deal at some length with this particular committee and its review of the regulations. I think I can summarize my conclusions on the work of this committee as being beneficial. I know that from our office's point of view we found the work to be beneficial.

Just as a note on that particular point--for example, Bill 110, which was just introduced: I cannot say whether it was a criticism, but certainly this committee pointed out that there was a bit of a problem with section 21 of the Occupational Health and Safety Act. I believe it was in its first report for 1981 but I am not sure now.

The section said at that time that the ministry may do certain things. The minister made an order under that section and there was a query in the report as to whether or not the minister had any power to make the particular order. Section 1 of Bill 110 clears up the problem that was perceived by this committee at that time.

I will move on to notice and comment review. What I would like to say about notice and comment at this time, briefly, is that I am

not dealing with what will happen in the future as a result of the committee reports.

I do make a speculative conclusion that, as a result of the recommendations of the Commission on Freedom of Information and Individual Privacy and the present study of notice and comment procedures by the standing committee, there will likely be a growth in the number of statutes containing notice and comment requirements. I speculate on that; I have no conclusions on that and I do not know what kind of recommendations this committee will make.

What the paper does do is point out that notice and comment is not foreign to the law of Ontario. We do have various statutes. Examples of existing statutes that have notice and comment requirements are: orders made under the Planning Act; section 22 of the Occupational Health and Safety Act; and notice and comment requirements under the Industrial Standards Act.

These are formal notice and comment requirements that already exist. There are others in law. Again, for space reasons, I could not get into each notice and comment procedure that is under Ontario statute law.

I must say that the paper is a public servant's view of the present law. My bias shows through from time to time. I do not apologize for the bias but I think that the members of the committee should be aware that the bias is there.

I do not know what else I can add to these comments. I do hope that the committee does find the paper to be of use because it would make the last several months of study and review of some wider use than merely informing the professor for whom the paper was written.

Mr. Chairman: Thank you, Mr. Revell. I am one who has read your paper and I think that it is going to be most helpful to the members of the committee in the future.

Mr. Revell: I would point out that there are some corrections to be made. I have provided Mr. Arnott with some additional copies on particular pages where I thought it was worthy of providing you with the corrections. There are a couple of other minor typos in it which I noticed in going through.

Mr. MacTavish kindly pointed out some errors a couple of weeks ago that I have corrected, but I missed a couple of them, Mr. MacTavish. I must confess I forgot to upper case the "O" on "Other Statutory Instruments" in a couple of places and I apologize for not getting the name of the committee quite right.

Of the corrections that are being made today, there is one serious grammatical error and a couple of incorrect citations. I thought it would be worth while for the committee to have the correct pages.

Mr. Chairman: Do any committee members have any questions?

Mr. MacTavish: Mr. Chairman, I just wish to thank Mr. Revell for mentioning the matter and for bringing it forward. I

think that, after having read it, he was kind enough to edit it. Beyond question, this matter should be on public record, and this is the place to have it on public record. Thank you very much.

Mr. Revell: Thank you, Mr. MacTavish and Mr. Chairman.

Mr. Chairman: Thank you.

Professor Mullan, the committee members are most pleased to have you here this morning. We look forward to hearing your comments and opening remarks, and I can assure you that there will undoubtedly be several questions from committee members.

10:30 a.m.

Mr. Mullan: Thank you, Mr. Chairman. I am grateful to you, Mr. Chairman, and the members of the committee, for the opportunity to come here this morning and discuss with you the topic of notice and comment.

My interest in notice and comment began about three or four years ago, more specifically when I was employed by the Williams Commission on Freedom of Information and Individual Privacy, to prepare a paper on notice and comment in connection with the freedom of information study.

At that time, I was aware of the fact that, in Ontario, the McRuer commission had recommended that we not move on notice and comment procedures in this province. There had also been a similar recommendation by the MacGuigan committee at the federal level in Canada in the late 1960s.

I was studying from a perspective which seemed to indicate that there was no need for a replication of the American notice and comment procedure in this province, or perhaps generally in Canada.

However, as I started my study for the Williams commission, I rapidly became convinced that notice and comment was probably a desirable procedure to have in this province, and perhaps generally in Canadian jurisdictions.

One of the principal hopes of the McRuer commission seemed to me to be that there was going to be a decrease, or at least a holding of the line, in terms of the amount of subordinate legislation that emerged in Ontario. The truth of the matter, of course, has been far from this. When the Economic Council of Canada produced its study, Responsible Regulation, a couple of years ago, it came up with a statistic that there had been a 103 per cent increase in the number of regulations in Ontario from 1970 to 1978. That included a 78 per cent increase in the total number of pages that those regulations occupied.

It seemed to me that once one started studying the content of some of those regulations, one began to realize that there had been a tremendous move in the location of where law was being made in this province: out of the Legislature and into the hands of the regulation-making authorities. It seemed to me that as a matter of

democratic theory it was probably not a bad idea to start thinking about means by which the public, and those specifically interested, could have an input into the way those regulations were formulated and drafted.

One way of doing this, of course, would be a dramatic reassertion of legislative or parliamentary power. However, it seems to me, even given substantial parliamentary reform, that there is more power coming back into the chamber than seems to be the case at the moment.

One of the problems would be that the amount of this regulatory activity is staggering. Also, in many instances, the kind of thing that is being dealt with in subordinate legislation is something which would probably be difficult to engage with sufficient expertise the attention and activities of members of the Legislative Assembly.

Against this background, I went to the United States material and it seemed to me that article 553 of the American Administrative Procedure Act provided a possible model for adoption in Canada. Of course, as you are all aware, this is the basic notice and comment provision of the American Administrative Procedure Act, applicable at the federal level in the United States but also adopted in the vast majority of states, either in the same or a modified form.

The beauty of the American notice and comment procedure is its basic simplicity. What it calls for, with some exceptions, is the advertisement of all proposed federal regulations in the Federal Register, 30 days in advance, with an opportunity for notice and comment provided to the public. Those familiar with the workings of the Federal Register would have an input into the drafting of those regulations.

In many instances, of course, the United States has moved well beyond this in specific pieces of legislation or an act of practice, but the basic model remains in the American Administrative Procedure Act, and it is that basic model which has generally attracted the favourable comments of American critics.

There have been some criticisms of what has happened in the United States, but they have been directed more towards the expanded version of notice and comment that has been adopted in certain jurisdictions or under certain statutes. I think the basic model is very much part of the United States' way of doing things and will undoubtedly remain so.

Against that background, I started exploring the possibilities of applying such a notice and comment procedure in this jurisdiction for the benefit of the Williams committee. Some of the things I thought about have also concerned this committee, judging from the minutes of the committee's proceedings I have read.

First, will this procedure be too costly? There are a number of elements to this. One of the elements is that the adoption of a general notice and comment procedure could lead to a situation with far too many regulations where there was no real need for obtaining public or interest input. One of the other concerns is the concern

of delay. If you have to advertise and you have to give everyone an opportunity to have their say about whether the regulation should be implemented or not, it may well mean regulations are delayed unnecessarily to the overall cost of the province.

There also seems to be some problem about whether or not it is possible to draft a list of exceptions that will take into account delay, cost problems, unnecessary problems and the like. In considering these criticisms, it seems to me there is not all that much to be said for it.

First, as far as cost is concerned, the total cost of giving the opportunity for notice and comment by advertising in the Ontario Gazette is probably not going to be all that much. Many of these regulations, as I understand it, go through a fairly intense, internal scrutiny before they ever see the light of day. The imposition of a 60-day notice and comment time period would, probably in the vast majority of cases, not lead to a situation of undue delay in the promulgation of regulations.

As far as the other criticism is concerned, the difficulty of drafting a list of exceptions, I think we are beginning to get sufficient experience now with the kinds of things that are not necessary for notice and comment, to be able to come to grips with that. I refer to such things as urgency; regulations that only effect a limited number of people; routine, internal matters which one would not want to have notice and comment procedures for. A list of exceptions could probably be drafted without too much difficulty, which would take care of most of the concerns people have about inappropriate circumstances being brought within the notice and comment procedure.

I guess that is basically all I have to say by way of general introduction to the topic. I would certainly be happy to entertain questions people have.

Mr. MacTavish: Professor Mullan, may I ask a question? The Americans, in Washington principally, under the Administrative Procedure Act, have had some many years of experience now in handling that act. How have they got along with their exceptions? I agree with you that the exceptions is a problem in this field. Have they let out most of the cattle to the pasture and kept very little, really good stuff in the stable?

Mr. Mullan: My understanding of the experience in the United States is that experience varies considerably. There are a number of specific exceptions in the Administrative Procedure Act. Military affairs exceptions, general policy statements and interpretative rules are excluded from the application of the act. There has been some criticism particularly of the exclusion of the latter two categories. Then there is a general good-cause exception. The administrative agency in question can by saying, when they promulgate the regulation, that there was good cause to exempt themselves from the application of the Administrative Procedure Act.

From what I gather, some agencies have been more willing to invoke this good-cause exception than other administrative agencies have. The one check that exists on this in the United States' system

is the possibility of judicial review if the good-cause exception is invoked too frequently. That possibility has kept some administrative agencies in line when they might perhaps have otherwise been willing to invoke the good-cause exception more frequently.

10:40 a.m.

Mr. MacTavish: Professor, you have hit the nail right on the head. Has not that exception overturned the show? Is it not being over-used to the point-- As you say, the check is the judicial review, but it seems to me the administrators are willing to gamble occasionally in tight cases. They will take a chance and they get away with it. Do you have a comment on that?

Mr. Mullan: I certainly agree with your latter comment. From what I gather, there has been some gambling at times of the kind to which you have referred. I would not go as far as to say the use of the good-cause exception has overturned the whole show. In the case of some agencies, it tends to be used more frequently than in the case of others. There has been some criticism of that. By and large, the Administrative Procedure Act provision is observed.

As far as any proposals for Ontario are concerned, if we were of a mind to move towards a notice and comment procedure, it may well be a good idea to look very carefully about whether or not a general good-cause exception is the kind of thing we would want to deal with. It may well be we would want to put the exceptions much more explicitly in the legislation, rather than using the general term "good cause."

Mr. Kerrio: Is there an alternative to using the exception route rather than third-party participation that could make these decisions we run into from time to time in various dealings with government? There have been many instances where the final decision is made by the very people from whom we are attempting to take responsibility. It is back with them again which, in this case, is somewhat true. Has there been any consideration given to an alternative method of the exceptions by third party?

Mr. Mullan: The proposal that came out of the federal Parliament's committee was that as far as the exceptions were concerned, any exception that was claimed would have to be referred to a committee of this type. If the regulation was promulgated during the session, the committee would have the opportunity to consider whether or not the exception should be allowed or disallowed. If regulations were passed claiming the exception out of session, they would be referred to the committee the moment the committee came into session again. At that stage, the committee would have the power, as I understand it, of referring the regulation or subordinate legislation to the House for disallowance.

That way of handling of exceptions has been suggested at the federal level by the Commons-Senate joint committee. I suppose that is one way of handling the exception difficulty.

Ms. Bryden: I was very interested to read Professor Mullan's paper prepared for the Ontario Royal Commission on Freedom

of Information and Individual Privacy and to note he disagreed with Mr. McRuer's decision that notice and comment was not necessary by legislation at this time. I think Professor Mullan has put some very compelling arguments for bringing in legislative requirements in this field of a general nature, similar to the US legislation.

Certainly, the shift of power from the legislature to administrative and cabinet agencies indicates the need for some sort of checks on the legislative process. On page 218, you say, "Checks, therefore, need to be devised to ensure the responsibility of those who 'enact' law outside the parliamentary arena." I think that is the crux of our problem right now.

You argue strongly that there would possibly be better regulations if we did have notice and comment. The expertise would come in from outside and the public's desires would be more sharply focused on the regulation; and there might even be greater public acceptance of the regulations.

Those are all the very important reasons that I gather led up to your conclusion. Have you had any reason to change your views since you wrote that piece for the royal commission?

Mr. Mullan: Not particularly. The concerns I have seen expressed since that time are the ones that I identified in my opening remarks; namely, that having a general provision may simply catch far too many instances of subordinate legislation and it would be unduly inconvenient to have to go through notice and comment procedures for all of those kinds of regulations.

My considered view, after listening to those criticisms, is that if we take sufficient care in drafting the exceptions clearly and explicitly enough, we may be able to overcome the difficulties of over-inclusiveness.

So generally I stand by what I said in the report which I wrote for the Williams commission back in 1979. The only reservation I guess I should make to this is that since then I have been out of the country for over a year and so I have not kept up as much with the front line of what has been happening in this area as I might have done, so there may well have been developments of which I am not aware that might cause me to change my views, but the inquiries that I have made in the last little while indicate not.

Ms. Bryden: I note that you have a good phrase on page 10 that this kind of legislation for notice and comment would reduce "the participatory vacuum." I think that is very well put, that in this day of complex legislation the Legislature is not the only method of participation in the making of laws and therefore we have to devise some methods involving the public and public opinion in the process.

I noted that you mention two prerequisites for the successful operation of notice and comment. One is the freedom of information law and the other is public funding for groups participating in notice and comment hearings. Do you still think that those are prerequisites?

Mr. Mullan: Speaking first to freedom of information, it seems to me that if people generally are going to be able to comment on subordinate legislation in a notice and comment regime, one of the important things they need to know is why it is that the department or administrative agency wants the particular regulation passed and what are the arguments for the promulgation of that particular subordinate legislation.

Unless there is some means by which the public generally and those who are concerned to comment on the regulations can get hold of at least some of the background material that is leading to the subordinate legislation in question, I have some doubts as to the value of participation that notice and comment would provide.

It was interesting for me in this respect to read Mr. Hess' testimony before this committee because his experiences under the Occupational Health and Safety Act seemed to me to indicate that they got their most informed and best comments, not when they simply put out a regulation in draft form initially, but when they attempted to do some explaining about why it was that this regulation was necessary and the background that led to the promulgation of the draft legislation.

Ms. Bryden: That was the interim report that he referred to, I think.

Mr. Mullan: Yes. Most of the proposals for notice and comment legislation recognize this and say that at least there has to be a concise or brief statement made by the body proposing the regulation of why it is that they want it and the background to it. I think that is a minimum. Beyond that it would seem to me that the use of a provision in freedom of information legislation calling for the availability of at least some background material giving some indication of why the regulation is necessary would be important.

10:50 a.m.

Ms. Bryden: The US has had that so it may be part of the reason why their law has been fairly successful.

Mr. Mullan: Yes, although comparatively recently.

As far as the second comment is concerned, it seems to me that at least in certain areas, and this one wants the notice and comment procedure simply to be captured by vested interest groups to the exclusion of public interest groups generally, it may well be that there is a need to consider providing funding for this type of activity just as various public interest groups are now being funded to appear before regulatory agencies and their regular adjudicative functions and are being provided with public moneys to do other lobbying and that kind of thing.

I think some specific recognition of the desirability of having as broad an input as possible is behind my notion that some consideration should be given to funding for this particular purpose to certain interest groups.

Ms. Bryden: Have you ever delved into the question of what

kind of public funding and how it would be allocated to the different groups? I understand some of the regulatory bodies that fund interventionists fund only after the event; in other words, costs may be awarded to an intervener but they do not know it in advance or they are not able to count on the money in advance.

Mr. Mullan: Yes. Certainly at the federal level, with which I am most familiar, that practice varies in the sense the CRTC will sometimes provide costs in advance but others will not, and that in some instances will mean a lack of participation from people from whom you might want it.

I think the whole business of public interest group funding is a very tricky area and one with which I do not deal specifically in this paper in any great detail.

Ms. Bryden: Have you studied it?

Mr. Mullan: No, not in the detail necessary to allow me to give any kind of informed comment before this committee.

Ms. Bryden: You mention the model state act. Mr. Chairman, I wonder if it would be useful if we could have a copy of that model state act in the US, which I understand about half of the states have adopted.

Mr. Mullan: Over half, yes.

Mr. Chairman: I am sure we could arrange that, Ms. Bryden.

Ms. Bryden: Does the model state act containing basically the same exceptions as section 553 of the US APA?

Mr. Mullan: I am sorry, I am not aware of what you have before you.

Mr. Kerrio: We have sections of the American act that would designate those areas of exception, and as you have suggested, those agencies that showed good cause that they should not be taking that route.

Mr. Mullan: If you have the model state act before you, I think you will see that the exceptions there are slightly different and formulated somewhat--

Ms. Bryden: I do not have the model state act; I just have section 553.

Mr. Mullan: The exceptions are slightly different and I think the intent in the model state act is to confine them somewhat more than the APA does.

Ms. Bryden: But you make a strong case for broader exceptions than section 553 in some fields in your brief to the royal commission, I gather?

Mr. Mullan: No, I do not think so. I think the converse; I

would cut down the number of exceptions. Indeed, in some instances it seems to me--

Ms. Bryden: Yes, I am sorry, I stated it the wrong way. You make the case for more coverage. I think you make a very strong case for coverage in the matter of policy statements or interpretative rulings because they certainly are part of the law, whether they are actually written into the statutes or not. I think that is probably the most important one.

Mr. Mullan: Yes, that is what I would regard as the most important one.

Ms. Bryden: But the one about procedural matters, as well, that are set by various bodies and set by regulation, do you consider that very important?

Mr. Mullan: Yes, I think so.

Ms. Bryden: But that is not covered by any of the US legislation?

Mr. Mullan: No.

Ms. Bryden: I think that is an important point, Mr. Chairman. If we are going to recommend any legislation in this field we should look at the whole question of what exceptions there should be.

Mr. Kerrio: Just to throw a little curve at you, if you are a ball fan, Professor. In developing some of these papers--the committee is very privileged to be able to bring people such as yourself before a committee such as this and we see it in many other committees--is the time coming when in the preparation of papers in a particular field, experts are going to have to bring into focus the economics of some of the things you propose and maybe go to some professors of economics and ask: "How far can this society go? What do we have to do? How would we put the priorities in order? Will we see a society that will begin to suffer for trying to implement too many things?"

Does that become a factor? Is that something that is beginning to unfold now?

Mr. Mullan: Yes, that is undoubtedly true. One of the advantages of notice and comment often put forward is it enables the economics of regulation to be considered a little more fully than it is at the moment. There is that kind of countervailing force, if one is speaking in economic terms. If you have notice and comment, it may be that things begin to be considered in somewhat more rational economic terms.

The federal commission--I forgot the exact title of it--on excessive paperwork, or something of that kind, in the United States came out with an interesting idea. This commission was initially appointed by President Richard Nixon to cut down on paperwork in the federal sphere. Generally, the paper condemns the excessive paper generated by government. The one thing that committee said, despite

its negative attitude toward the use of paper by government generally, was that notice and comment was the one exception.

They felt the amount of paper and time used in generating good regulations in first place, ultimately amounted to a total saving for the system. Economically it was better to have the rules done properly the first time around, than get involved in the costs of trying to rectify disasters subsequently. That was their informed view although they did not do a rigorous economic analysis of it. That is an interesting comment, at least on the American system in economic terms.

Mr. Chairman: Any other questions?

Mr. Runciman: Just a followup; the McRuer commission mentioned costs involved in getting into notice and comment.

Mr. Mullan: Yes.

Mr. Runciman: Have you taken a look at that area and what kind of implications there might be for Ontario?

Mr. Mullan: I specifically have not attempted any definite cost figures. That is an area in which I would not be expert to comment. In terms of the basic initial cost, which is the easiest to measure, of advertising in the Ontario Gazette, that would not be very much in comparative terms. The overall cost in terms of how much extra this is going to add to government is something I have not looked at, save in the sense I identified a few moments ago in responding to the last question. Maybe if you do it right the first time, that saves a lot of cost down the road. But that is not a very exacting economic analysis.

Mr. Runciman: I suppose you are not aware of whether the McRuer commission took an in-depth look at that, although they mentioned it as a concern.

Mr. Mullan: My assumption is, based on what I have been told, is they did not.

Mr. MacTavish: May I ask some questions?

Professor Mullan, Ms. Bryden referred to the model state Administrative Procedure Act.

Mr. Mullan: Yes.

Mr. MacTavish: Was that prepared by the Conference of Commissioners on Uniform State Laws by any chance?

Mr. Mullan: Yes, I think so.

Mr. MacTavish: You say that has been widely adopted?

Mr. Mullan: Yes. Let me try to be as accurate as I can. In the vast majority of states there is a notice and comment procedure in place. Some of it follows closely after the model of section or article 553 of the federal Administrative Procedure Act.

11 a.m.

However, in many instances, the basic model adopted is the one found in the model state Administrative Procedure Act. There are variations between the states as to the kinds of things they cover in the basic notice and comment provision. Initial coverage and exceptions tend to be dealt with in a somewhat varied form between the various states.

Mr. MacTavish: Yes. Perhaps you will agree with me when I say that is an understatement. The variation is quite considerable from the north to the south and from the east to the west.

Mr. Mullan: I would not quarrel with that, at least in terms of exceptions in coverage.

Mr. MacTavish: May I have your comments on a situation? You referred to Ottawa. What is the current situation there in regard to this subect of comments?

Mr. Mullan: Okay, the current situation, as far as I am aware, is that the joint Senate-Commons committee on statutory instruments has reported favourably on the desirability of a notice and comment procedure. I have no present information as to how far that has been taken in terms of any legislative agenda.

The other information known to me is that the Pearson committee on regulatory reform, which reported in late 1980 or early 1981, also came out in favour, as part of the regulatory reform package they recommended, of notice and comment procedures, though not quite as firmly as the joint Senate-Commons committee had done.

Mr. MacTavish: Do you see any action?

Mr. Mullan: No, I have not seen any action.

Mr. MacTavish: Going to the other side of the world, my understanding is--and I can be wrong, it would perhaps be the first time--that in Australia they have tried notice and comment and given it up.

Mr. Mullan: Yes, in 1916.

Mr. MacTavish: Do you have any comment on why?

Mr. Mullan: They gave it up in 1916, as I understand it, and I am not quite sure why.

Mr. Kerrio: They had other things to do.

Mr. Mullan: The British gave it up in 1943, having had it on the statute books from 1896.

Mr. MacTavish: Thank you, you anticipated my next question.

Mr. Mullan: I guess Professor Wade, who testified before the McRuer commission, said it was given up in Britain because it

was not needed. There was sufficient informal consultation going on before regulations were adopted and the British Act was more honoured in the breach than in the observance. There have been some other comments on that, criticizing Professor Wade's notion of why it was given up in Britain.

The comments I have read, counter to what he said, was that it was in place long before it was needed and it was given up three years before the Americans finally got around to adopting it. To pay much attention to either the Australian or the English experience, pre-Second World War, is not particularly apt in this day and age.

It is interesting that at the Commonwealth delegated legislation committees meeting in Australia in 1980, Mr. Williams the then chairman of this committee attended. It adopted in principle in its final report the notion that notice and comment was probably a desirable thing to be considered as part of the future legislative agendas of committees of this kind.

Mr. MacTavish: They will probably develop that next year when they meet in Ottawa.

Mr. Mullan: Yes.

Mr. MacTavish: I was going to ask you if you would have any comment on the conclusions of the Carl Williams committee report on this subject, which disagreed or very considerably watered down your recommendations. Is that a fair question?

Mr. Mullan: I guess the Williams commission did not see as many links between notice and comment and freedom of information as I did. I suppose, in a sense, the the principal motivating force in their notion was that it should not be moved on specifically at this stage.

Also, I guess it is fair to say, judging by what is said in the Williams commission report, that they still have some concern that McRuer may be right and I am wrong on this particular issue. That was the crux of their consideration of the topic in their recommendations.

Mr. MacTavish: Thank you, Professor. One further question, if I may, Mr. Chairman.

Do you have any knowledge of action in other provinces, other jurisdictions of Canada other than Ottawa?

Mr. Mullan: No. I mean, nothing beyond the limited examples which I referred to in my paper for the Williams commission; I have simply not done a follow-up job on provincial action since then. I have had a look at what has been happening at the federal level and here, but not in the other provinces.

Mr. MacTavish: The chances are, I suggest, that if there had been action, you would have heard about it one way or another.

Mr. Mullan: Perhaps, yes.

Mr. MacTavish: Yes. Thank you very much.

Mr. Chairman: Any other questions? If not, we would like to thank Professor Mullan for coming before the committee this morning.

I certainly have found your comments to be most informative and I think you can rest assured that they will be taken into account when the committee reaches a decision.

Mr. Mullan: Thank you very much, Mr. Chairman. If there is any information I can provide to the committee at any stage I would certainly be willing to do so.

Mr. Chairman: I think that covers our agenda for this week.

We are still trying to get Mr. Mundell to appear. He has been in ill health and has had an operation which was obviously more serious than we initially thought. We are informed that he is still in the process of recovering from that operation.

We will contact him at the beginning of next week. If we are unable to get him, perhaps we will have former Chief Justice McRuer next week. If it is agreeable to the committee members, we will notify you as to who is going to be here next week.

Thank you.

The committee adjourned at 11:08 a.m.

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

EXPLANATORY NOTES

THURSDAY, JUNE 3, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUM...

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McEwen, J. E. (Frontenac-Addington L)
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Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

From the Ministry of the Attorney General:
Tucker, A. S., Deputy Registrar of Regulations, Office of Legislative Counsel

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Thursday, June 3, 1982

The committee met at 10:17 a.m. on committee room 1.

EXPLANATORY NOTES

The Vice-Chairman: I see a quorum. The chairman is away this week and has asked me to take over for him. We have appearing before us today Mr. Sidney Tucker, deputy registrar of regulations. I would like to thank him for appearing before us on relatively short notice. Sorry we had to keep you waiting to get a quorum here, but we could not start without a quorum.

I would like to call on Mr. MacTavish to start things rolling for us.

Mr. MacTavish: Thank you very much, Mr. Chairman. Turning to the agenda for today, the first item is explanatory notes. This is a matter we have had before the committee off and on for a while. The last time it was before the committee, the witness was the present registrar, Bill Anderson, who is now, as we all know, ill, unavoidably absent from Queen's Park. The last time he was here he asked that the matter be referred to him for further study and consideration. If he thought it advisable, if he came up with an opinion, he would be happy to present it to the committee.

Meanwhile, let me read the note in the agenda sheet for today's meeting. "From the point of view of the unsophisticated reader, should each regulation (or at least some of the more obscure and complicated regulations) when published in the Ontario Gazette be accompanied by a short descriptive explanatory note as is done in some jurisdictions (Ottawa and Washington)?"

Attached to the agenda are a number of examples of the practice in Ottawa taken at random from the Canada Gazette, which, I think, fully illustrates the practice in Ottawa.

I am sure the committee would be happy to hear your comments from your dozen years of experience in the office of the legislative counsel and as deputy registrar of regulations for Ontario. Would you care to carry the ball from there, Sid, please?

Mr. Tucker: Thank you. There may be a misconception in the comment on the agenda about putting an explanatory note on the regulation when it is published in the Ontario Gazette. If the practice is instituted, it would probably be similar to that which is done in the preparation of legislation, of statutes.

When explanatory notes are prepared for bills going before the Legislature, they are prepared in conjunction with the administrators, the legal departments, and drafted with some care. We want them to be accurate. We want them to be full enough so that they explain what is being done. It is not done after the bill is

passed and becomes law, but beforehand. That would probably be the same thing with a regulation. It would be done beforehand.

It would be some change in procedure in the preparation of regulations, rather than simply the registrar putting an explanatory note on something that is published in the Gazette. That would not be the approach I would prefer. I would prefer that if explanatory notes are to be used they be prepared at the same time as the regulations are prepared.

As to whether or not we should use explanatory notes, generally speaking I am in favour of them. But I have a feeling it will substantially increase the work load when you have between 800 and 1,000 regulations going through a year. Some of them are not quite as simple as the material from the Canada Gazette, for instance, would seem to indicate some of the federal regulations may be. A one-line or two-line explanatory note often will not be sufficient. If you have a number of different things being done in a regulation, you will want to refer to all of them.

Once you are into explaining, if my experience with preparing bills is any indication, those preparing them will want to be careful enough in the preparation that they explain fully what is being done.

As you know, the members of the House from time to time have asked the office of legislative counsel to expand explanatory notes rather than contract them. Briefness is not necessarily desirable. What is desirable is a complete explanation as much as is practical and I think the same trend would develop with regulations. Once we get into it, it will certainly be a longer process. It will take time to prepare them and there will always be the question of how much is enough.

Generally speaking though, I think explanatory notes are a good thing. I guess only experience will tell what the effect will be. It will increase work loads substantially.

One of the factors always in regulations is being able to produce the regulation within a reasonable time. It is something that makes statutes work. It is part of the mechanism that makes a statute work and administrators are often concerned about delays in preparation of regulations.

Add one more factor to it and I expect I will hear this is one more thing that is going to slow down the time it takes to produce a regulation. I do not know if it will be substantial or not, but there will just be more pressure on the draftsmen. Draftsmen, of course, learn to live with pressure.

Mr. Kerrio: Does it not follow that in the preparing of an explanatory note you are extending the development of the legislation and making it more meaningful for the interpretation of the legislation once it has been passed? Does it not go hand in glove? I cannot understand how you might be thinking in terms of putting in legislation or finding it adds to the work load to develop the explanatory notes. I would have thought they would go hand in glove so you would get a feeling for the legislation.

Mr. Tucker: It may be a very good thing from the point of view of the draftsman. If you can write an explanatory note, you certainly understand what you are writing. It may be good from that point of view. Yes. As I say, I have no objection to it and if it increases work load, then that is the way it is.

I detected another element in your question. I do not know if you intended that or not, but people may look to the explanatory note to interpret what is in the regulation.

Mr. Kerrio: Absolutely.

Mr. Tucker: I do not know if that is a valid approach or not. In the past, in dealing with statutes, the approach of the courts has been that the explanatory note is not part of the bill and should not be looked to to understand the legislation. I think that there is a trend developing to change that and courts are looking to wherever they can to get any information and any assistance in understanding what they call the intent of the Legislature.

Mr. Kerrio: I have had that experience in construction. They will tell you the details will override the drawings, that the specifications will take precedence over the drawings. What you are really doing is doing a little drawing with your explanatory note.

Mr. Tucker: It may be something similar here. It is an experience that has been developing in the United States and to a small extent has been extending into Canada and into Ontario. The courts have occasionally looked to explanatory material as a basis for supporting an opinion or a judgement the court is coming to. That could also develop with regulations.

We have, in the past, found that headings in the Gazette are looked at by courts in interpreting the regulation that is published under that heading. The heading is not part of the regulation, yet they have, in the past, looked at it.

Mr. Kerrio: It could develop an intent by the description that may not perhaps be in the regulation.

Mr. Tucker: That is right. It may not have been intended and it is simply an editorial note put on in publishing. They will use that if they see fit.

Mr. Kerrio: Sure. It happens to us all the time.

Mr. Tucker: The consequences could be severe and it is something that lawyers worry about. You are adding one more factor to the variables that will lead a court to come to one conclusion or another. Lawyers prefer to have some certainty in what they are doing and the explanatory note may be looked at as simply one more variable. It may be one thing that is on the negative side.

On the positive side, of course, is the ease of understanding what is written without having to go and look up the regulation itself, assuming what we are talking about is an amending regulation

which may not, in itself, be clear because it simply says, "Strike out one word and put in another word in its place."

Of course, once you go back to the original regulation you see right away what they are doing. The explanatory material does not necessarily take the place of the research.

Mr. Kerrio: It could in many instances, though, when it is very essential.

Mr. Tucker: It should not. I think that any person doing research should still go back and check the actual documents. The explanatory note may be helpful only to people who do not want to do research.

Headings to the regulations themselves will indicate the subject matter. Even the statute that it is under tells most of us what the nature of the subject matter is, whether we are interested in that area or not.

Mr. MacTavish: On that point, Mr. Tucker, I note in the Canada Gazette regulations and the explanatory note which follows each one that there is an italics note under the main heading "explanatory note," in brackets:

"This note is not part of the regulation. It is intended only for information purposes."

Now, Sid, would you have in mind, in introducing such a system as this, including a note along those lines in the heading?

Mr. Tucker: It might be advisable to do it. What effect it would have, I do not know.

You cannot say, "It is here, but let us pretend it is not." It will be there and people will look at it and they will say that this is the official gazette, this is the official publication and that is what appears in the official publication.

Ms. Bryden: I do not know whether Mr. Tucker is finished his presentation or not. Are we open to questions?

Mr. Chairman: Yes, we are.

Ms. Bryden: How long has the federal government been printing these notes with the regulations?

Mr. Tucker: I have not done any research to check how long they have been doing that. I think it is probably a year. I think it is relatively recent.

Ms. Bryden: Have you heard, either from lawyers or the government officials, whether there have been any cases where a judge has specifically referred to the explanatory note in making his judgement?

Mr. Tucker: No, not with regulations, although it has

happened with statutes. There may simply not have been any court cases yet at all dealing with particular regulations.

Ms. Bryden: Yes. It is too soon.

Has the Canadian Bar Association or the Ontario Bar Association expressed a desire to have such explanatory notes or are they opposed to them?

Mr. Tucker: I do not know that the bar association has taken any position at all on it. As far as I know, our office has received no comment at all from the Canadian Bar Association. I am not aware of them taking any position or even discussing the matter.

Ms. Bryden: I do not know whether Mr. MacTavish knows if they have, or whether it would be worth considering them.

Mr. MacTavish: They have not, to my knowledge. Perhaps I should add this. In due course, they hope to have someone from the joint committee on regulations and other statutory instruments in Ottawa down here to testify on such points as this, among many others.

The senior counsel there is one Mr. Eglington, who has been on the job for some time and is very knowledgeable in this field. I think that he will be helpful in pointing out how the system is working in Ottawa.

I think, if I might put this to you, Sid, that one should not look at this proposal for explanatory notes from the point of view of the extra work for staff. I think it should be looked at from the point of view of the public.

10:30 a.m.

Mr. Tucker: I agree with that completely. It is just one more of the factors involved.

Mr. MacTavish: Quite.

Mr. Tucker: The effect on staff is probably the most minor thing involved, but there are a number of variables to be considered all the way to what effect the courts will use with it.

The only point I wanted to make at the beginning was that--I do not know whether it is a matter of any great concern--I would prefer that the explanatory notes be prepared beforehand, just the same way as is done with bills, rather than have it performed as just an editorial thing afterwards. I think it is something that should be done with as much care as the drafting of the regulation itself.

Mr. MacTavish: Yes, I would agree with that comment. Perhaps, Mr. Chairman, I might add this, that Mr. Tucker is quite correct when he emphasizes the occasional difficulty in drafting an explanatory note. It is sometimes more difficult than the substantive part of the regulation or the statute, as the case may be.

The Vice-Chairman: I can often read the bill much easier than I can the explanatory note. It is more confusing than the bill itself.

Mr. MacTavish: It is very difficult on occasion to prepare a note accurately without having it pages and pages, 10 times as long as the bill itself. It is a very difficult thing.

You are often tempted--I will not say one ever gives in to the temptation--to simply say, "This is far too complicated; put in that it is self-explanatory." Then the reader will not admit that he cannot understand it.

Ms. Bryden: Yesterday, the general government committee was imposing on municipalities the job of putting an explanatory note in front of zoning bylaws when they give notification of them to the public before they are adopted, and the same with official plans.

If it is a difficult task, we are placing this task on to municipalities. Would it be your understanding that, if it is drafted as part of the drafting of the regulation, it would then be part of what goes to the cabinet for approval by order in council?

Mr. Tucker: If it is a regulation made by cabinet, cabinet would then be approving the regulation itself. The explanatory note would not form part of the regulation, any more than the explanatory note forms part of a bill that the minister introduces.

I think it would have to be the regulation itself that is made or approved by cabinet. The explanatory material may be there with it, but I do not think it would form part of it.

Ms. Bryden: I see. I imagine the explanatory note on a bill is there when cabinet approves it, so it would have the same status, which is really no official status except for printing the explanatory note.

Mr. Kerrio: It is called a "do as I say" regulation.

Mr. Tucker: I may say that, in talking about explanatory notes that say "self-explanatory," we only use those when in fact it would take more words to write an explanatory note than just to say "self-explanatory." The explanation would take more words than the bill itself and it really is clear, when you read it, what it is about.

We have a general rule in drafting legislation that, if you feel the matter is so complex that you cannot talk about it, you had better have a second look at it, anyway.

Ms. Bryden: On the question of subheadings, are regulations ever drafted the same way as bills are with side headings beside each clause which indicate what is in the clause?

Mr. Tucker: No, they are not. Side notes are not put on regulations. The side notes are almost an historical thing with

legislation; they go back a long way. They are used as sort of an index.

Mr. MacTavish: If I may add to your comment, the side note practice is quite old. It took the place of indexing in Britain at Westminster; they never indexed their statutes in England. I do not think they do yet. They have summaries and tables of contents, so to speak--a breakdown of each act, or some acts, complicated ones or lengthy ones--but the side notes are what they relied on for many years.

We have gone a little farther here in Ontario and right across Canada. We have side notes and full indexes as well, which are designed to help but may mislead. If the index misses a certain heading, it may do more harm than good for the reader. It is a problem.

Ms. Bryden: Would you, Mr. Tucker, recommend that side headings might be considered for regulations?

Mr. Tucker.: No, I do not think I would. I think side notes are not necessarily that helpful. People do prefer to use indexes today, if there is an index. Regulations are of such a nature in themselves that when we first go to a particular area looking for something, we go to the statute. The first way we find something is through the heading to the statute and under it, the headings to the various regulations.

It should not be that difficult to find something internally in a regulation without side notes. They would not be of much value. They cause some problems mechanically, I would suspect. I doubt their usefulness, frankly, in putting them into the Gazette and the printing and so on.

Ms. Bryden: When you talk about subheadings, as opposed to side notes, presumably you would use those only where there is a very definite division, such as if the regulation has a part 1 and a part 2.

Mr. Tucker: You may also use subheadings where there is a useful break in subject matter within a long regulation that is not broken up into parts. It is useful to put headings in there from time to time, but they should be used with care too.

Ms. Bryden: That has been used quite a bit, has it not?

Mr. Tucker: We use headings in statutes and regulations but a draftsman has to be careful about them. If you make amendments later putting a section in where it may appear to be convenient, one always has to watch that it does not come under the wrong heading somewhere. Even headings must be used with caution.

The Vice-Chairman: Are there any further questions on item 1 which is explanatory notes?

HEADINGS OF REGULATIONS

Mr. MacTavish: Mr. Tucker, turning to number 2 on the

agenda, headings of regulations. The question is: "Can anything be done or should anything be done to improve the headings on regulations as published by the Ontario Gazette?"

This subject is of relatively small importance, but more editorial care in the composition of headings in the Ontario Gazette would, it is suggested, be greatly appreciated particularly by those who are required to peruse the regulations regularly. It is a simple matter of better focusing.

It may be that in a considerable number of instances, an improvement could be made in the makeup of the headings of the regulations in the Ontario Gazette to make them more descriptive of the contents. If this were done, perhaps by expanding the heading or by the use of subheads, as Ms. Bryden was referring to, it would be a boon to the busy reader.

For example, Ontario reg 861/79, made under the Agricultural Development Finance Act, has a one word heading "Deposits," while the regulation deals solely with interest on deposits. Why not help the reader by having the heading read "Interest on deposits"?

Another example is Ontario reg so and so, made under the Collection Agencies Act. The heading is "General," while the regulation amends five forms, nothing more. Why not have the heading read "Forms" as it was done under Ontario reg so and so made under the Tobacco Tax Act? Similar criticisms can be levelled at many other regulations.

10:40 a.m.

If further examples are wanted, many are readily available. Here are four. The head note of each reads in part, "fees and expenses" whereas it should read "fees and allowances." There is no authority for giving fees and expenses. The word in the statute is "allowances." Would you care to comment on that matter?

Mr. Tucker: Yes, I can comment on that for you. I was a little surprised to see you picking regulations made three years ago. The first two examples have since been revoked. But what you picked were amending regulations, amending another regulation. The one dealing with deposits was amending a regulation whose heading was "Deposits" and did deal with deposits.

The practice followed is to always use the heading of the main or parent regulation when publishing an amending regulation. If you are following amendments to that main regulation through, you will always see the same heading, not a variety of headings, depending on what particular section is being amended.

Mr. MacTavish: I follow that. Excuse me. Go ahead.

Mr. Tucker: I was going to say it is the same with the second example. It is an amending regulation dealing with some forms under a general regulation. That is why we use the same title as the parent regulation's title.

Mr. MacTavish: Why not use the parent regulation heading

plus the finer part of the amendment, such as "Deposits: interest on deposits" to clue one in as to what the amending regulation was all about? You run into it quite frequently where you have a general regulation, the master or principal regulation, dealing with a whole bunch of things. Then an amending regulation comes along on one little bit of that parent regulation, yet the heading is general. It does not give the reader any idea of what of many subjects the amendment is all about.

As Ms. Bryden said, could not some better use be made of subheadings?

Mr. Tucker: If I understood Ms. Bryden correctly, she was talking about subheadings within the body of the regulation, not in the headings in the Gazette. Subheadings to headings would probably not be useful, because you are looking at it from a different point of view than the point of view of the people who actually use regulations.

When you check on amendments to regulations, you are looking to see how that fits back into the parent regulation. The first thing you want, is to know which regulation is the parent regulation. You have the name of the statute, you have the name of the regulation and then you check the internal changes being made. It is a matter of pulling the two together, having the two side by side and checking them.

The material there now in the heading brings a person to that. It is not just something for quick skimming.

Mr. MacTavish: If I may put it this way: to me, as a lay reader of a regulation, it does not matter whether the subhead is part of the principal head at the top of the thing or in the substantive part of the amending regulation. I get the light turned on no matter where it is, as long as it is there somewhere.

Mr. Tucker: It seems as though what you are asking for--

Mr. MacTavish: Excuse me. If I might just carry on. It seems to me the system of dealing with headings is fine for the sophisticated people who deal with regulations constantly. They know the system. But the members of this committee do not and the general public does not. All they are looking for is the key word.

Mr. Tucker: What you are asking for is another explanatory note at the front as well as one at the outline.

Mr. MacTavish: A one-word explanatory note. Yes, that is exactly what I would suggest might be helpful to the members of the Legislature and the general public, never mind the legal profession. Would you support that principle or not?

Mr. Tucker: It is not an easy question to answer because I do not know but what it would lead us into in a number of regulations. How long is the subheading going to get? If I have a regulation that has 20 items in it, do I then have 20 subheadings?

Mr. MacTavish: Take my example, which I referred to a couple of times in the Agricultural Development Finance Act. There is a one-word heading under a certain regulation, "Deposits." The regulation deals solely with interest on deposits. Why cannot those--

Mr. Tucker: Mr. MacTavish, it was also a two-section regulation when I went back to check it.

Mr. MacTavish: I am picking a good example.

Mr. Tucker: Yes, and I see you did too with the other one which only amends some forms. But I could equally, by random chance, have picked up some regulation which had 20 different topics in it, and then we would have 20 different subheads.

It is hard to develop a standard of what is desirable in a heading as well as doing the same thing over again in the explanatory note at the same time. It is a question of what is enough.

Mr. MacTavish: That is about right.

Mr. Kerrio: We have to go to our counsel batting .500 and to do that would get you right up at the top of the league.

Mr. Tucker: You have a good counsel, yes. I agree with that.

Mr. MacTavish: If it is about .500, I will be delighted.

The Vice-Chairman: Any further questions of Mr. Tucker?

If not, thank you so much, Mr. Tucker, for appearing before us. He is one of a series of ongoing fact-finding witnesses we have appearing here.

Next week we have Judge McRuer appearing before us. I would like all members to make a point of trying to be here promptly at 10 a.m. for the good judge to talk to us and answer our questions.

If there is no further business, I shall declare the meeting adjourned.

The committee adjourned at 10:49 a.m.

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

NOTICE AND COMMENT

THURSDAY, JUNE 10, 1982

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

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Clerk: Arnott, D.

Staff: MacTavish, L., Counsel

From the Ministry of the Attorney General:
Revell, D. L., Legislative Counsel

Witness:
McRuer, Hon. J. C., Former Chief Justice of the High Court for Ontario; Commissioner, Royal Commission Inquiry into Civil Rights

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Thursday, June 10, 1982

The committee met at 10:11 a.m. in committee room 1.

NOTICE AND COMMENT

Mr. Chairman: I see a quorum. We are most pleased and proud to welcome as our witness today the Honourable James C. McRuer, OC, QC, former Chief Justice of the High Court of Ontario and commissioner of the Royal Commission Inquiry into Civil Rights.

Mr. Justice McRuer, we are most pleased to have you with us this morning. We have read with interest and intent your comments on notice and comment procedures in your royal commission report. We thought it would be most appropriate if we asked you before the committee to comment on the very important subject we are dealing with now and also answer any questions committee members may have in connection with this matter. Welcome, Mr. McRuer.

I would now like to ask our counsel, Mr. MacTavish, to make a few introductory remarks.

Mr. MacTavish: Thank you very much, Mr. Chairman. To set Hansard straight and on the beam in so far as this committee is concerned, perhaps the committee will forgive me if I quote from what we call the McRuer report, to give it a convenient handle here. I would like to read from volume 1 on page 370: "It is imperative that some effective form of review by or on behalf of the Legislature should be established."

And on page 373 of the same volume: "The experience in both the United Kingdom and Australia shows that much improvement in the form and operaion of regulations is attained by the mere existence of the"--watchdog--"committee. The ministers and officials are sensitive to its possible criticisms."

Then the keystone on page 368: "If the recommendation that regulations be automatically referred to a scrutiny committee of the Legislature, which we shall make in the next chapter, is adopted, the committee will be immediately informed of all regulations and with the assistance of counsel these regulations will be reviewed within the terms of reference of the committee. The Legislature will then be informed of those requiring its attention."

Needless to say, Mr. Chairman, the Legislature saw fit to adopt this recommendation made some 12 years ago, and this is the committee that has come from that recommendation. I have never heard this committee referred to as the McRuer committee, Mr. McRuer, but there is no reason why it should not be because it is yours.

Turning now, if I may, to your opening paragraph of chapter 25, which is entitled "Procedure That Should Govern the Exercise of Subordinate Legislative Power," you say: "Two main safeguards have been suggested:

"(1) Before regulations are made, persons whose interests will be affected by them should be given an opportunity to make representations on their own behalf.

"(2) Regulations when made should be brought into effect in a fair manner and with proper publicity. Persons bound by them should have an opportunity to acquire knowledge of them before they can be penalized for failure to comply with them."

Interjections.

Mr. MacTavish: I am wondering, Mr. McRuer, if you would care to comment on those two, as you call them, suggestions?

Hon. Mr. McRuer: First, I am flattered I have been asked to appear before the committee and discuss the matter you are particularly interested in. One is how regulations should be made and, two, how the public should know about the regulations made. We gave this a great deal of consideration and study.

Although you refer to the report as the McRuer report, I had very able assistants associated with me. I made the ultimate decisions, but we had an extremely able and mature staff. With respect to this aspect of the report, Professor Mundell was in charge of the research work that went into it in very close co-operation with me.

When we come to the matter of regulations and compare it with any other jurisdictions that have process of legislation by subordinate bodies, we have to remind ourselves of the importance of a parliamentary system. That becomes important in comparing it with systems that have been developed in the United States.

We did not study the system of enacting subordinate legislation in any other country, such as, France, Holland and so on, because they have a completely different system of government. We did study the system in the United States because they are close to us and what they did affected the commercial life of Canada.

Having said that, when you compare the United States with the procedures in Canada, you have to keep in mind it is a different system of government. The flow of power is entirely different. The members of the cabinet are not members of the House. They are not subject to the accounting to the House indirectly by committees of House representatives and the Senate.

You are particularly interested in the subject of notice and comment as I take it from reading the transcript. You wanted to hear from me because we had given that very careful consideration in the preparation of our report. We considered it a very important part.

10:20 a.m.

To start with, you talk about regulations. We were particularly concerned that there is a great body of regulations made by boards that are never published. They do not come under the Regulations Act. You may be--and this was discussed in the freedom

of information commission too--subject to punishment arising out of a law you had no possible way of knowing about. That is true in Ontario. In the United States they call them agencies. Here they are boards or they may be called other names.

I think it would be useful if you could get from someone a catalogue of the bodies that can make regulations that are binding law. That was a part of the freedom of information enterprise, the principle that bodies existed which can make laws and it is hard to find them.

The best example arose when we were doing the civil rights inquiry. I could not get a consolidation of the rules of the law society which had the power to make rules and to amend them. There were a lot of amendments. But who had the consolidation of the amendments? Could you find them in the legislative library?

I happened to--as I had been a bencher--have my own copy which was supposed to be brought up to date. But 10 or 15 years had elapsed since I was a bencher and it was hard to find out what they had been doing since then. I think that has been cured by requiring the self-governing bodies to file with the registrar. I hope I am correct on that. I think they must file a copy of their rules or amendments.

I do not pretend to have kept up, by any means, with the legislative action that has been taken since our report was made. There has been a great volume of it and I was busy on the bench and could not keep up with current legislation. After retiring from the bench, I was busy with the civil rights and law reform and there may be corrections that are important.

Having made that sort of a preface, I will discuss the question I have come to discuss--notice and comment. I give a warning that it is not simple to establish any system of notice and comment that would apply across the board to subordinate legislation. In the United States they have so many exceptions that they are almost greater than the rule.

I will stick with our own system of government. To begin with, each minister is responsible for some department; there are some duties assigned to him either by law or by cabinet action. He is responsible to answer in the House for any regulations passed by anybody in his department.

He has a departmental responsibility, and there are the regulations passed by cabinet. The Lieutenant Governor in Council may make regulations that we often see in statutes. I understand there is now a committee chaired by a member of cabinet who reviews all the regulations that must go before cabinet before they are enacted.

I do not know if it is a cabinet committee; all I know about it is that it exists. I might suggest that you consider whether you should have the chairman of that committee up here before you to assist you on what they do. I do not think it is a cabinet secret. Probably after you get a freedom of information act, you will have all their reports, but that is merely a suggestion.

In formulating our conclusions, I studied the experiences of England particularly because they have a parliamentary system, and they do make a lot of regulations. We had Professor Wade and this was his particular department at Oxford. He was a member of one of the committees; I do not know whether it was the Franks committee or the Donoughmore committee that studied this subject. They had decided against notice and comment as probably being impractical. They had tried it for a number of years and discarded it.

10:30 a.m.

What they felt was that if you had a subject that was to be the subject of notice and comment and that would be useful, you would so state it in the act conferring the regulatory power, subordinate legislative power, and you could define the nature of notice and comment on the--that undoubtedly had very considerable influence on considering what notice and comment ought to be attached to subordinate legislative power.

It is undoubtedly necessary to have an input when most regulations are being made, but the input varies according to the type of regulation; very often it is just procedural matters that are left to be dealt with by regulations, but more often it is very substantive matters.

The illustration of very substantive measures is one that you already have before you, the Occupational Health and Safety Act. The legislature has in that act acknowledged the wisdom of having notice and comment; however, I am a little confused as to just what the provision means in section 22: "Prior to a substance being designated under paragraph 14 of subsection 41(2), the minister,

"(a) shall publish in the Ontario Gazette a notice stating that the substance may be designated and calling for briefs or submissions in relation to the designation,"--that is, that asbestos is a substance coming within the act--"and

"(b) shall publish in the Ontario Gazette a notice setting forth the proposed regulation relating to the designation of the substance at least 60 days before the regulation is filed with the registrar of regulations."

That means to publish the regulation, which I take it is a very voluminous one because I think it went on for 85 pages or something like that, but what is to happen afterwards? Is that a warning to comment on the regulations, or did the notice and comment just extend to the designation of my illustration of asbestos?

After it has designated asbestos, the regulation is to be published 60 days before it becomes effective. Suppose some representations are made under this act. You assume that the regulations are submitted for notice and comment during this 60-day period. There is nothing to prevent them from going on and filing the regulation, anyway, after 60 days.

Assuming that there is serious comment on it, if they amend the regulation, do we have to go through the whole thing again with a republishing of the amended regulation for the public?

This was taken as an example. I just warn you that any question of notice and comment has to be very carefully dealt with. That is one of the reasons I have drawn a very firm conclusion that a blanket provision would be very unwise.

I think it is a very much better approach that if the delegated power should be subject to publication and notice and comment, it should be in the act creating the power and not in a general act covering all regulations.

We went into the process of what was called, at that time, making regulations in Ontario. We came to the conclusion that (a) they were very careful public servants in the performance of their duties; (b) like all public servants, they could make mistakes, and that is not restricted to public servants--judges make mistakes--and that there should be a review body that would not review the substance or go into the political discussion of the legislation, but that the body had kept within its bounds of reference, and that, of course, was taken seriously by the Legislature and it held this committee.

10:40 a.m.

I have looked over one of your reports and have found that you found several provisions where the regulatory power had gone beyond its jurisdiction, and that is very important. It is very important for the regulatory power, I do not care who it is, whether it is the securities commission or the Lieutenant Governor in Council, to keep within the jurisdiction conferred on them, and that when they go out these regulations are not subject to what we will call a legal interpretation. They are in many things handled by very ordinary people, but that is the regulation we have to follow. There should be a safeguard that they are not going beyond their jurisdiction, and that is an important function.

We were impressed, though, with the fact, and I think in the past 10 years the regulatory bodies have been most careful to consult with those who are likely to be affected most by the regulation. I do not know how many of these regulations you have read that are bound up in the consolidated regulations that take more place than the statutes. For example, I had a look over the boilermakers' and steamfitters' regulations. The regulatory power could not possibly draw that voluminous regulation without intimate consultation with those who were familiar with making boilers and doing steamfitting, the amount of pressure per square inch in certain sizes of tubing and the like.

I do not think there is any obligation. There may be some statutes--Mr. MacTavish will correct me if I am wrong on that--that provide that after consultation they may make regulations. I am not sure about that.

Mr. MacTavish: I know of none, sir.

Hon. Mr. McRuer: I do not think it is a matter for legislation necessarily, unless you are putting in a clause requiring some sort of consultation. The notice-and-comment clause, though, may provide a very cumbersome way of accomplishing what may be a very simple matter if you apply it to all regulations.

There is one thing that did occur to me that you will have to have in mind. We wrestled for days and days--I think probably months--over the question of an administrative procedure act. This section--553, is it? It is in the 500s someplace--that provides for notice and comment is only one section of a very voluminous act. We had representations that we should have an administrative procedure act in Ontario. There were serious recommendations put forward and they had merit.

We could not see ourselves with such a voluminous act as they had enacted in the United States, so we decided that it had to be simple and not create a lot of litigation over whether you come within the powers expressed in the act.

One thing you have to remember is that you get far more litigation in the United States over exercise of simple legislative powers than you do in Canada. I do not know what it will be in the future. I forecast that there will be a great body of litigation over the Charter of Rights and what you can do under the Charter of Rights, but that is something for the future.

We devised the Statutory Powers Procedure Act, which was enacted with great care. It is to provide for notice and comment to those who are entitled to a hearing. Where they are entitled to a hearing, there are certain procedures that must be observed by the tribunal. There was an exempting clause in it that excepted regulations, clause 3(2)(h), "a tribunal empowered to make regulations or bylaws in so far as its power to make regulations, rules or bylaws is concerned."

10:50 a.m.

When I read this, I must confess I was a bit confused about it. I take responsibility because I am sure every word of it was cleared with me before it went into the act. But the words "in so far as the power to make regulations is concerned," were, I thought, an exemption from the exemption; that it was only exempt in so far as the power to make regulations was concerned.

I spoke to Mr. Mundell last night on the telephone, and he told me what he thought they meant. The tribunal that has power to make regulations was exempt from the provisions of the act, but it was in so far as the exercise of the power is concerned. I think you can take it that a tribunal is exempt if it has power to make regulations.

That is a guide to the principle of notice and comment. When you come to the delegation of legislative power by a blanket statute of any kind, I think you are going to run into the question: Has the notice been sufficient, has the opportunity been given to the right people to pass the regulation? You could say, "Publish it in the Gazette." The department knows perfectly well that people who never read the Gazette are going to be affected by this regulation, very much so.

We were convinced the system that was and is being followed, of consultation at all stages, depending to a certain extent on the intimate knowledge of the different departments of government of

their own business. If the Legislature is of the opinion the power to make regulations should be more limited and subject to a wide publication of the proposed regulations and an opportunity to make representations, it should be set out in the act.

There is not much use in saying that, prior to publication, they should be published in the Ontario Gazette. Each one has to be dealt with as it arises. Some of them are very simple, but there is this wide body of regulating power, subordinate exercise of power, that is not controlled by ministers. When I say "not controlled," I mean that there is the ultimate control by a minister, but it is a periphery of the machinery of government. There are innumerable boards to make regulation from day to day.

The Ontario Securities Commission has to make snap regulations which are legislative power to stop trading, say, at 11 o'clock this morning. You cannot have a meeting about that. They cannot have a trial about it. They have to protect the investors in certain cases.

I think I have talked too long, and I am going to leave it now for the members of the committee to raise any questions they would like. I shall be very happy to answer any that I can answer.

Mr. Chairman: Thank you very much, Mr. McRuer. We found your remarks most interesting, and I am sure there will be some questions by committee members.

Mr. MacTavish: Mr. McRuer, you mentioned you found the Occupational Health and Safety Act to be a bit woolly as to the intent and meaning. I understand there is a bill in the House at present to amend that act and, if I am correct, to extend its cover of notice and comment.

We are fortunate to have three legislative counsels sitting behind you. I am wondering if Mr. Tucker would care to sit beside Mr. McRuer for a few minutes and explain the problem he has from your point of view and also what this amending bill does.

Mr. Revell: My name is Donald Revell. I am a legislative counsel in the office of the legislative counsel. The bill you are referring to, Mr. McTavish, Bill 110, was introduced on June 14, and its purpose is to address the very matters Mr. McRuer has mentioned.

There was some concern about the way the existing section 22 was drafted, to refer only to paragraph 14, which is the designation provision. It did not deal with the real guts of designation, which is contained, I believe, in section 42(15).

Mr. MacTavish: Right on this very point.

Mr. Revell: Yes. The redraft of section 22 clarifies that the section applies not only to the designation itself, but to the substance of the regulation. It provides, in much the same way as the present section, for notice and comment, publication in the Ontario Gazette, with an opportunity for people to make submissions.

11 a.m.

The ultimate responsibility after submissions have been received--the minister will have an opportunity to do one of two things: either ignore the comment, which is probably unlikely in the light of the history of the existing regulations that have been made with respect to asbestos and lead, I believe. The comments have been considered; I think Mr. Hess was here and explained that procedure three or four weeks ago.

The minister will be able to amend the regulation and if he does so he will not have to go through the full notice and comment procedure again--this is the amended draft regulation--but he will be able to file it with the occupational health and occupational safety advisory committee, I believe it is called, and he will give notice of that filing, so anyone who has concerns at this point will be able to obtain a copy of the amended draft regulation. I believe 30 days after filing with the chairman of that committee, or at such later date as the minister provides, the regulation could come into effect.

The present regulation-making power or notice and comment provision also does not state clearly whether or not it applies to amendments to these designations at a later stage. It is quite clear in the new section 22 that it applies not only to the initial regulation, but to any amendments to the initial regulation after it has been filed.

Is that helpful?

Mr. MacTavish: Yes, thank you very much, Mr. Revell. That explains it, and I think clears the air that Mr. McRuer found very cloudy.

Hon Mr. McRuer: Might I just say that, to my mind, emphasizes the wisdom of the conclusion that we came to 12 years ago, that when you have a notice and comment it is difficult to have legislation for it that is applicable to all regulations. The experience apparently showed here that, in the first place, the wording of the section was very unhappy, but that the sort of notice and comment and the sort of practical application of the procedure are important if you are going to have it. But what would do for steamfitters and boilermakers will not do for the Highway Traffic Act.

Mr. MacTavish: I would like to draw the attention of the committee to the report of the commission on freedom of information, the so-called Carl Williams commission, that commissioned a paper, a study, by Professor Mullan of Queen's University, who testified here a week or so ago. He recommended strongly, as the committee will recall, a particular special act of a general coverture, quite similar, as he envisaged it, to the American Administrative Procedure Act.

I would like to go to the conclusion of the Williams commission where, on this point, they make two short recommendations.

"1. We recommend that governmental institutions engaged in rule-making activity be encouraged to adopt notice and comment procedures so as to facilitate public discussion and informed comment on particular rules proposed for adoption.

"2. Consideration should be given to the adoption of provisions requiring notice and comment opportunities in specific statutes which confer rule-making powers on governmental institutions."

Mr. McRuer, I take it you would support and endorse at least the second of those, if not both of them.

Hon. Mr. McRuer: Yes. I cannot have any quarrel with the delegation of the legislative power. It is necessary in the process of parliamentary government. But there may be cases where they wish to say, "This power shall only be exercised after proper notice to the parties that will be affected by the power." I quite agree with the Williams commission on that.

I read Professor Mullan's paper again yesterday. I had read it before when it was presented to the Williams commission. If I may say so, it seems to have escaped him--I am sure it did not escape him but he did not deal with it--that the American system of government is different.

Here you have the opportunity of calling the minister to account in the Legislature and asking, "Why do we have this troublesome regulation?" if it is a troublesome one. I am sure that has been done in this very case with the Occupational Health and Safety Act. It is the Legislature which decided to act in that we have not defined our notice and comment appropriate to this particular act. It might not be appropriate to, as I say, the boilermakers' and steamfitters' regulation power.

I do agree with the second recommendation of the Williams commission that you have read.

Mr. Chairman: Ms. Bryden, I believe you have a question.

Ms. Bryden: Mr. Chairman, I would like to say how glad we are to have Mr. McRuer before us because I think he has brought us a considerable number of very useful suggestions, as well as new insights into the whole problem.

Among his useful suggestions that this committee should look at, in addition to considering the general principle, is that we perhaps ask the cabinet committee that does discuss or review regulations before they are passed if they would appear before us or send a representative to give us some idea of what knowledge is brought to them before they make their decisions, how much detail is provided and whether they check into the process of consultation in detail or have a report on what has been done in the nature of consultation. I think it might be useful if we could arrange that.

11:10 a.m.

Your second very practical suggestion was to try to get a catalogue of all the regulations or any orders of self-governing bodies that are binding in law. Presumably, such a catalogue would be available to the public. It would be a form of publication perhaps different from the Gazette, but a form the public could consult. That might be a very useful recommendation we could consider.

I remember that the Environmental Assessment Act exemptions are not subject to the Regulations Act. People would not necessarily know about them except that the Ministry of the Environment does follow the practice of gazetting them, but I understand it does not have to because they are not subject to the Regulations Act.

This would be an example of the kind of things that should be part of the catalogue, as well as all the rules of the self-governing bodies which become binding on the practitioners.

Hon. Mr. McRuer: May I interrupt you? You mentioned the Environmental Assessment Act. That is an example of law that is binding on people who are affected by it, but where do you get it?

It is the law of the land, and the law of the land should be available to this committee. It might very well affect your deliberations in this committee. If you are dealing with certain regulations in that area, you say, "Oh, there is another that deals with that too."

To my mind, law is something that should be available to everybody. You do not know who might be affected by it. People call it secret law. It is not secret law. It is publicly made, but try to find it. It is not always publicly made, mind you; the regulations of the self-governing bodies tell you what the regulations are, but it has not made them public.

Ms. Bryden: I think that is the important point. The citizens who might object to a Hydro development, for example, would not realize it was exempt from the Environmental Assessment Act until they attempted to ask for an environmental assessment hearing. Then they would find out from the Ministry of the Environment that there was an exemption. You would agree that this is the kind of thing we are talking about.

What about the self-governing bodies, Mr. McRuer? Do you think there are a lot of regulations there affecting the members of the professions concerned that should be published?

Hon. Mr. McRuer: I do not know any reason why any regulation of the self-governing bodies ought not to be published. The regulating power may not be a matter that ought to be made public because there may be discussion of it. After all, there are certain privileges that arise with lawyers and with doctors that cannot be disclosed in public.

Concerning the fact that there are regulations which are part of the law, certainly as far as the law society is concerned, I can see no reason why all these rules should not be public. They were intended to be public. The trouble was that an amendment would come up; it would be in the law society office and nobody would take the trouble to have a book published annually, or every five years or whenever it was, to bring the amendments up to date. It was not that there were so very many of them for the law society, but it was one I was familiar with.

Ms. Bryden: The Williams commission, as Mr. MacTavish read to us, did recommend that those affected by any regulation or rule having a binding effect on them should be notified. That might be different to the publication and public availability of all regulations.

Hon. Mr. McRuer: I would suggest that this is something you have to leave to the good faith of the regulatory power in the execution of their duties. They do consult with those likely to be affected.

If you attempted to establish any general clause, such as the one that those affected should receive notice, you might make it so difficult in sorting out who is going to be affected that you will make a mistake in it and your whole clause will be ultra vires.

It is difficult enough to legislate now and to make sure. The members of the Legislature are supposed to be omnipotent. They know everybody's business and can represent them. That is all right in theory, but in practice you know it is impossible. That is one reason why you have delegated legistive power. If you do not know the party who is going to make the regulations, you had better find out.

Ms. Bryden: If we did have general cataloguing and those catalogues were available in libraries or ministry offices, would you not get around the problem of notifying those affected? Presumably, once it is a public document of all regulations, those affected can find out about it.

Hon. Mr. McRuer: I think that after the regulation is passed, those affected by it should be able to find out where it exists.

Ms. Bryden: But, as you say, there may be difficulties for the person or body making the regulation to find out who is actually affected and to notify those people. The general publication or cataloguing would cover that problem.

With regard to the more philosophical question of notice and comment and how widespread it should be, we are all aware of the problems of the sheer volume and wide variety of regulations coming out and whether you do need specialized legislation for notice and comment in certain circumstances, rather than general notice and comment. You brought forward some of the problems there.

As the need for consultation grows, is there not a danger that civil servants may not consult the right persons?

11:20 a.m.

Hon. Mr. McRuer: That is true with any legislation. Those responsible, say, the members of the cabinet, may not consult the persons who are going to be affected by it. My own view is we have a pretty good civil service. They are much more likely to know the people that are going to be affected by it because they run the departments. The civil service affecting labour, say, will know who

is going to be affected by it better than a majority in the Legislature would, before passing a section in the act regarding this matter. They have left it to regulations.

Mind you, I feel there are far too many regulations. You people have to do your business in the Legislature and say this is not a matter--We have to have a section in the act. I criticized that in my report. I gave some illustrations of matters that were left for regulations and I said, in conclusion, the Legislature was not too sure what they were doing so they were going to the Lieutenant Governor in Council.

Ms. Bryden: I could not agree with you more, Mr. McRuer. I think the opposition certainly has tried to limit the regulatory power, especially in clauses such as the minister may do anything that is not provided by this act that appears to be relevant to the act or something to that sort.

Hon. Mr. McRuer: There are a great many things that are just taking up time of the Legislature. They would not know the subject matter in detail the way, take for example, steamfitters and boilermakers would. How many in the Legislature know what pressure there should be in a pipe two inches in diameter? That is an extreme case, but there are procedural matters that are--The best example of that is the rules for practice of the Supreme Court. That is a delegated legislative power. When I was first on the court, they did not even have to be filed. You had to look some other place to find the rules for practice that now come under the Regulations Act.

Ms. Bryden: When you suggest the notice and comment should be part of each individual act, you do, I gather, recognize there are some areas where notice and comment would be particularly useful in preventing costly mistakes or bringing in expertise the civil service may not be aware of or may not have consulted and that notice and comment is perhaps not only more necessary but would be advantageous in the regulatory process.

Hon. Mr. McRuer: I think when the bill is going through, it is up to the Legislature to determine what should be left to regulations and what should be in the bill. I do not think I can be general about that.

Ms. Bryden: We are now in the process of amending the Planning Act. We are bringing in a new Planning Act which is going to impose on municipalitiess a notice and comment procedure for bylaws either changing the official plan or changing zoning bylaws. This is going to be written into the legislation. It seems to me this is an example in which the province is imposing on the municipalities what it itself should be following with regard to certain areas that affect a great number of the public.

Hon. Mr. McRuer: That is a very good example. The Legislature is deciding, and properly so, that this affects so many people that before action is taken there should be an opportunity for those who will be affected to speak. I remember appearing once myself before a planning board as to what it was proposed to establish in the area. I do not know if it had very much effect, but it was an interest of mine, not mine personally, but my family was interested.

The principle of conferring notice and comment by statute is well established, but I am completely against an omnibus act, or applying in a broad way in Ontario law the American principle put forward by the professors. I think it is contrary to the parliamentary system.

Ms. Bryden: Another example that indicates new situations that are coming before the Legislature is the question of regulating the use of word processors which are known as VDTs, video display terminals. This is revolutionizing the whole office operations of governments and the public generally.

There was a bill before the Legislature last week requiring a whole lot of regulations for the working conditions of VDT operators and the installation of the machines so there is adequate shielding from radiation. This seems to be another example where there should definitely be mandatory notice and comment because I would think every person engaged in an office clerical operation which uses these machines is affected and, of course, every employer that installs these is affected. It affects both employment standards and occupational health and safety, so it goes beyond the Occupational Health and Safety Act.

11:30 a.m.

That might be an example where you would have to amend several statutes to require notice and comment.

Hon. Mr. McRuer: That is a matter of legislation with respect to the particular matter. I am familiar neither with the process nor what you are talking about.

Ms. Bryden: The term "video display terminals" just sounds lethal. That is the term that is being used for this problem. Anyway, I am sure that you would consider it one that might be considered for specialized notice and comment.

Hon. Mr. McRuer: It might be that you want a board, not merely the minister; it may be they want hearings, and so on, before the regulation is passed. I do not know. Some of these things are so broad in their affect that you want a public hearing properly advertised, and so on, before you proceed with it. That has been adopted in many cases.

In fact, our own commission felt there are a lot of processes of government that were not giving sufficient attention to the civil rights of the individual. It was a very broad reference to consider all the laws of Ontario.

On the function of public hearings, you may have a hearing by a committee of the Legislature before the act goes through. It may be a special committee. It may be referred to a committee to sit between sessions.

Ms. Bryden: I might say that the particular bill, which was a private members' bill, was defeated mainly by Progressive Conservative members, so we have a vacuum in the legislation there

at the moment. Perhaps a standing or select committee should consider this. I hope there will be a move to appoint such a committee from the Conservative side. As I say, they defeated the bill.

I just have one final topic that I wanted to probe a little bit, and that is the problem of amendments when you do have notice and comment, whether you would have to go through the whole process again for every amendment or whether you can classify amendments as major or minor.

The proposal I have heard put forward is that amendments could be made without the notice and comment procedure, but that after they are gazetted as having been passed, there could be a 30-day period in which either the minister could refer them to a legislative committee or an advisory board, or in which 20 members of the Legislature standing or making a petition could refer them for some further hearings before they become effective.

That would mean that if this does not occur any amendment would automatically go into effect on publication. I think that is the part of Bill 110 that was referred to earlier, that amendments would be filed with the advisory committee on occupational health and safety, but that they would go into effect immediately on filing. It does create an opportunity for delaying if there is concern about an amendment.

Hon. Mr. McRuer: That would not arise under my suggestion. If you are going to have notice and comment, I think you have to have it for the amendments as well because parts of the language used in conferring the regulator power take in the health and welfare act.

The regulatory power includes power to define any words used in the act which are not specifically defined. You could, by changing all the words in the act, be taking it to absurd lengths. I am concerned with the power, not with how it is carried out.

When you are amending an act, you intend to amend it, to change it in some way that is to be effective law. If you think it is necessary before you delegate the power to make effective law, I think any change should be by the same process. I think what we have lost sight of is that it is not the regulations passed by the minister, nor the regulations passed by the Lieutenant Governor in Council we are talking about; we are talking about all subdelegated legislative power.

I am drawing on my recollection of what the law was 14 or 15 years ago and the problems that arise with it. Everything changes. There are boards all over the country that are regulating, by law, our lives. You have to have exemptions a mile long if you are going to have a general act. There must be notice and comment before a regulatory power is exercised.

As you have had to do with the act we have just been discussing, you will have to revamp the delegation of the power by introducing another bill. That is quite proper. Get it right in the first place, if you can, but you cannot always be right in the first place.

11:40 a.m.

I want to tell you of an example I had when I was on the bench. The Legislature had provided that an adopted child should have all the rights of a child born under lawful wedlock. A case came before me where the adoptive mother was dying. She had a very large estate which was in trust. She did not have control over it, but it was in trust for her children and she wanted a declaration as to whether the act applied to her adopted child who had been adopted years before the act came into force. I held that it did apply and the child was as if born in lawful wedlock. All right. There was no contest; all heirs agreed.

But another case came up very shortly after where there was a contest. It was the same thing. A child was adopted before the act came into force. The Court of Appeal held the act did not apply and the adopted child got nothing. They went on to the Supreme Court. They supported the decision of the Court of Appeal. There was nothing the Legislature could do to help those children. But during the very next session, they promptly said the act shall be retroactive and apply to an adopted child no matter when he or she is adopted. They followed my decision, which I felt that is what they meant.

There was an act that had gone through and nobody thought about it, naturally, until it got into the courts. It is the same way with the regulations. Some of them get into the courts. I had to deal with a regulation as to who was a peach grower. The regulation had defined--I have forgotten the details of it now--but at any rate, if you construed it that a man who had one peach tree in his back yard was a peach grower, he was contravening the regulation if he gave a basket of peaches to his neighbour. I reduced it to that absurdity and held the regulation did not apply.

The legislative process we have is a good one. We have inherited it from England and we have lived with it now for as long as we have been under English rule. They have lived with it in Australia, they have lived with it in New Zealand and I think we will stick with it as it is. If the Legislature wants to give, let us say, notice and comment, say so and to what extent.

Ms. Bryden: Yes. I agree amendments should--

Mr. Chairman: Ms. Bryden, if I might interrupt you, we will move on to Mr. Kerrio, who had a question.

Ms. Bryden: Yes. I just had one final comment to make on what Mr. McRuer had just said.

What I was more concerned about, Mr. McRuer, was that where you do give notice and comment in the legislation, there is the charge that there will be great delays if, as a result of the comment, the initial regulation is amended substantially before it is adopted. This is the problem we are wrestling with on delay in that sense. I certainly agree with your other comments on regulatory power.

Hon. Mr. McRuer: I just could not hear you very well.

Ms. Bryden: I was concerned as to whether, when you do have notice and comment, what you should do if, as a result of notice and comment there is a substantial change in the regulation proposed. Do you then have to go through the whole procedure again or is there some way of short-circuiting that?

Hon. Mr. McRuer: There may be different situations with regard to the different subject matters. You solve it, normally, in reference to the departmental health and safety act. For the purposes of that act, where there may be a trivial amendment, but it is necessary because there is some decision of the court about the regulation, you could probably delegate that by doing a power of amendment.

If it had gone through publication already, of what affects the principal, the regulating body may give such publicity as it deems necessary in the particular circumstances. That is just off the top of my head--I do not know. It is the idea that you could delegate the notice and comment to the regulating body.

Mr. Kerrio: We certainly are fortunate to be able to discuss these matters with the former chief justice. I feel very privileged because we are not often given this kind of forum.

Hon. Mr. McRuer: I am the one that is privileged to be here.

Mr. Kerrio: I wondered if you may help us in this regard; you have touched on it. Maybe you dealt with it when I was drawn away from the chamber here. We often hear the phrase among lay people that ignorance of the law or a regulation is not a good defence. I agree that in many instances that is true. You have pointed out there are often cases where people are not aware because of the circumstance of how regulations are drafted and where they are hidden.

With the patriation of the constitution, is there going to be a change in what is required of legislative bodies to give more adequate notice in order for the law to be upheld when it is tested? Might we be wise as a committee to look into whether that is going to change in any way the drafting and setting up of regulations so they can be enforced without going to many courts to prove the validity of some of them?

11:50 a.m.

Hon. Mr. McRuer: I can give no forecast of the results of the Charter of Rights transfer of power to the courts. I just wish I was 40 years younger. I would have a wonderful time. You are talking right down my alley. In my second report on civil rights, I recommended against a charter of rights in the constitution for the very reason many have argued; there is going to be a transfer of power to the courts away from the legislature.

I do not know how these things will be construed at all. Thank goodness, I do not have any responsiblilty for it. The only thing I can say is I have responsiblilty for recommending we do not have a charter of rights embedded in the constitution.

Mr. Kerrio: I can appreciate why you have said that. Thank you very much.

Mr. MacTavish: I have one point. It has been touched upon in a fringe way, and I would like to bring it right out into the open. If you would care to comment, Mr. McRuer, I think the committee would be delighted to have it on the record.

The suggestion has been made that when a bill is introduced into the Legislature that contains power to make regulations, that section of the bill should automatically stand referred to this committee for study and report back to the House to see whether or not the powers asked for the delegations are necessary or advisable.

The person who is designing the bill is probably anxious to get all the delegated power he can in order to cover all eventualities in the future. Some he may forsee, many he may not forsee, but he wants to be sure he can make a regulation on a given subject if he needs to some time down the road.

That suggestion has been made, and it raises obvious difficulties, timewise, with regard to the business of the House. A bill of that sort would probably be given to another committee to deal with. So we will have one section to this committee, the balance of the bill to another committee, and the time factor becomes pretty important, among others. It is hard to see how it would work in a practical way.

Perhaps the clause referred to this committee probably could be discussed just as well in the standing committee to which the entire bill is referred,and could be reported back to the House with or without a memo. Would you care to comment on that suggestion?

Hon. Mr. McRuer: The idea would be that this committee should sit in appeal on the work of the cabinet committee. The cabinet has decided this is a matter where there are certain aspects of the bill, say, it is a bill with respect to the highways, certain aspects of the regulatory power that may be questionable, and they may be referred to this committee. This committee is an ex post facto committee, but the idea is that it would be a committee that would consider the reference of the regulatory power to the regulatory body, the Lieutenant Governor in Council.

All I can say off the top of my head is that it appears to me to be a process that would probably give this committee more work. I cannot see that they would accomplish any good purpose, except possibly make the legislative process more difficult. I think it can prolong it. Any matter that is difficult can be referred to a committee of the Legislature, and to have any standing rule that all regulatory powers come to this committee before they are enacted would create--I think the legislative process is difficult enough now without adding to it.

Mr. Chairman: Thank you, Mr. McRuer. On behalf of the committee, we would like to thank you for coming here this morning. Indeed, sir, it is our pleasure and we are flattered that you were able to attend before us. We appreciate your comments and will undoubtedly take them into account in reaching our final decision. Again, thank you very much.

Hon. Mr. McRuer: Thank you, Mr. Chairman. I am very pleased to have had a share in the legislative process. I am still interested in it.

Mr. Chairman: Before committee members leave, we have a few procedural matters to discuss very briefly. I received a complaint from Mr. Van Horne this week that we seem to be meeting every week for a fairly short period of time rather than every few weeks for a rather lengthy period of time. My response to Mr. Van Horne, although I promised him I would bring it up here with other committee members, was that with this particular subject we have been scheduling witnesses as the witnesses were available to appear before the committee. While I appreciate his concern, and indeed in the future maybe that is how this committee should operate, I think that we have been operating as best we can with what we have had to work with in the timetable before us.

12 noon

If the committee members feel differently, this is your committee, not mine. I am merely the chairman and I am at your disposal.

Mr. Kerrio: If I could speak to that, Mr. Chairman, I appreciate that the arrangements in the past have been such that we have accommodated people as to when they could appear before the committee. I do think the other option has some validity if you would want to consider that we could have a meeting that would take a little longer and that we not have meetings as often.

I would leave that to you, Mr. Chairman. You might consider that as an option and just govern this committee accordingly. If we could meet every second week or so and tidy up, unless we had someone appearing, I think that would be in the best interests of the committee.

Mr. Barlow: I think there were one or two meetings that were postponed or cancelled because there just did not seem to be enough business to warrant them in the early going of this session. Probably in the future, as Mr. Kerrio says, it would be a good idea to operate that way.

With witnesses, it is rather difficult to predict how long it is going to take. One witness might take two hours and the next one 20 minutes. It just depends on the questioning that is prompted by the witness.

How long a witness is going to take is not sometning that certainly you, as chairman, or anybody, could predict. We have two of them packed in and, all of a sudden, the first one takes two hours and then either the second one is not going to have a fair hearing or will be coming back.

It is something that is pretty difficult. Certainly for my sake I would leave it up to your good judgement to treat us right.

Mr. Chairman: We do have Mr. Eglington, who is chief counsel to the joint Senate-House of Commons committee on regulations, able to attend on June 24. He cannot come next Thursday but he can come the following Thursday. If that is all right with committee members, we will schedule him in in that time slot.

Ms. Bryden: Is it possible that there may be a spring session windup at that time and that the House might be sitting in the morning on that day? Can you ask him to come on the basis that we might have to cancel it at the beginning of the week or whenever the House schedule appears?

Mr. Chairman: Certainly, I think we could leave that relatively open. The clerk has been talking to Mr. Eglington and I am sure we could reach a decision early in that week. I think that is a very good comment.

Professor Mundell still has not recovered sufficiently to allow us to talk to him and certainly we do not want to press him or prod him into action.

We have not proceeded all that far with respect to a possible trip to Washington. I think Mr. Eglington and that committee has indeed gone to Washington and talked to US legislators and some of what he has to say may have some bearing on what our thoughts are in that regard.

I have asked Mr. MacTavish to try to get a draft report on the first four months of this year available as soon as possible. If it is possible to discuss that on June 24, we will do that as well.

Hon. Mr. McRuer: I was talking to Mr. Mundell last night on the telephone and he seems to be pretty well recovered. He said he was going to get in touch with Mr. MacTavish. He sounded surprisingly well. He was probably pretty sick, but he says he has made a very good recovery. I would say, from talking to him, that he would be able to attend before very long.

Mr. Chairman: Thank you, Mr. McRuer. We will have Mr. MacTavish contact Professor Mundell and arrange for whenever it is most convenient for him, either next week or June 24, if indeed we are able to sit on June 24.

That is really all I have. If no one else has any matters, we will adjourn until either June 17 or June 24.

The committee adjourned at 12:06 p.m.

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